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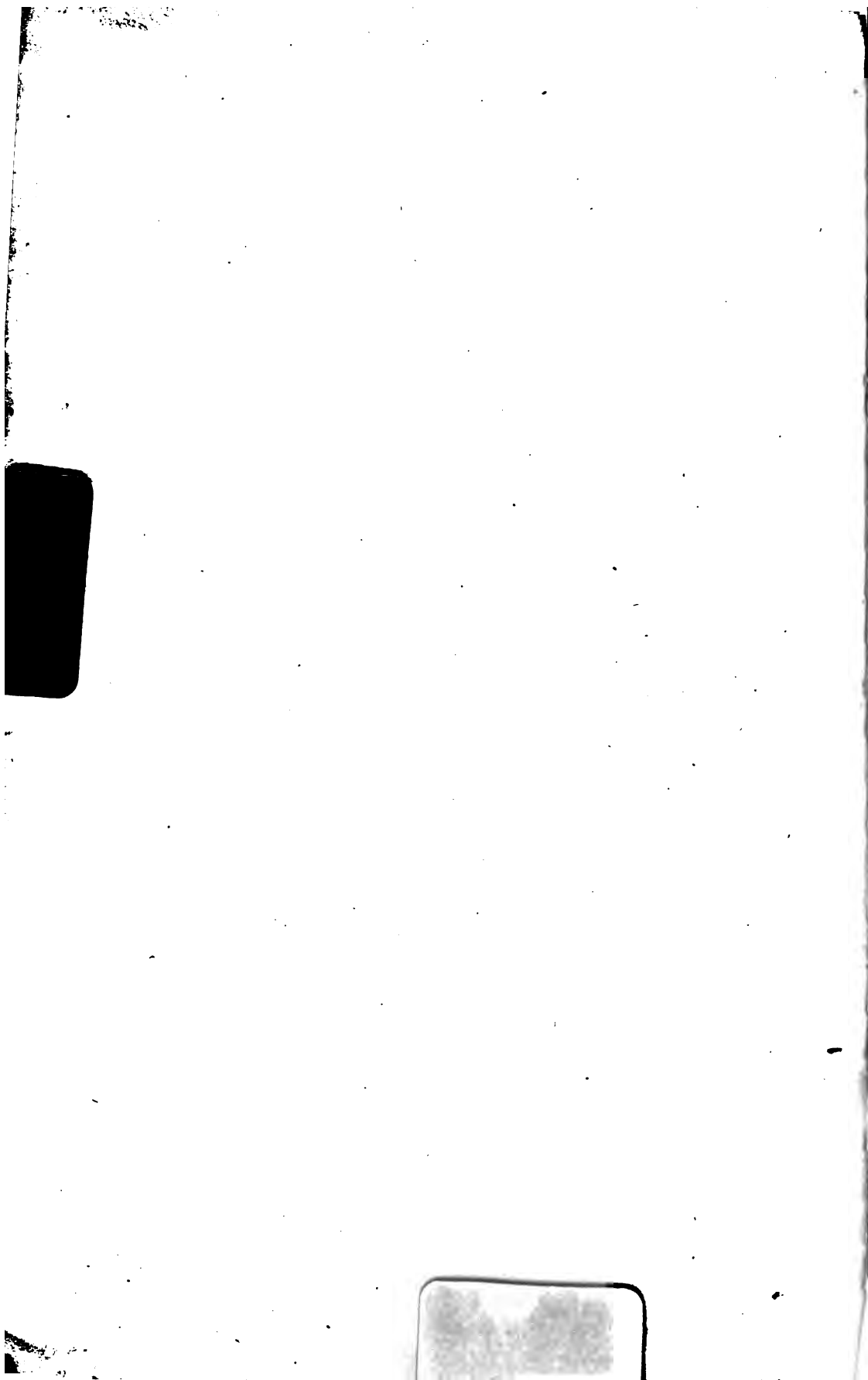
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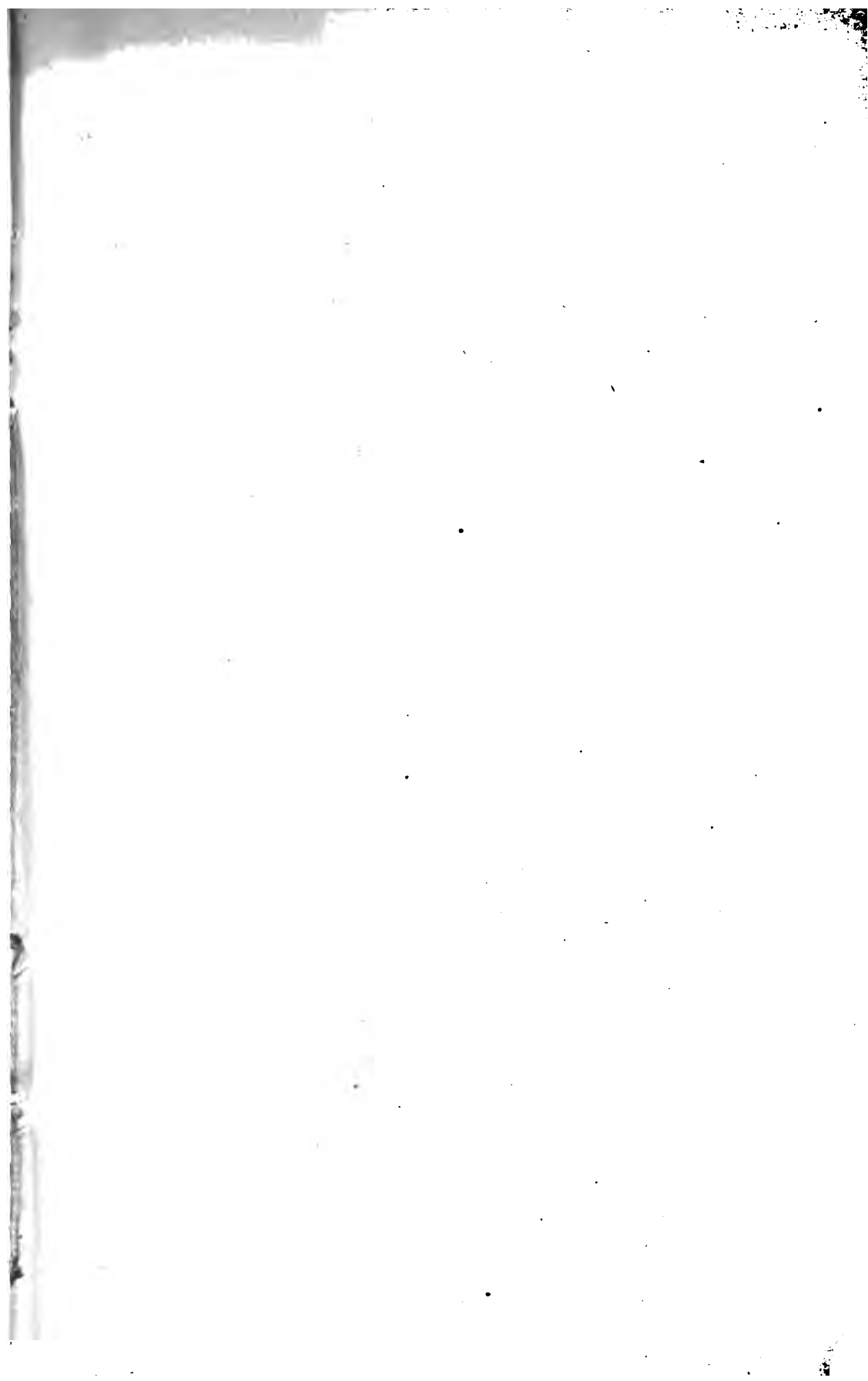
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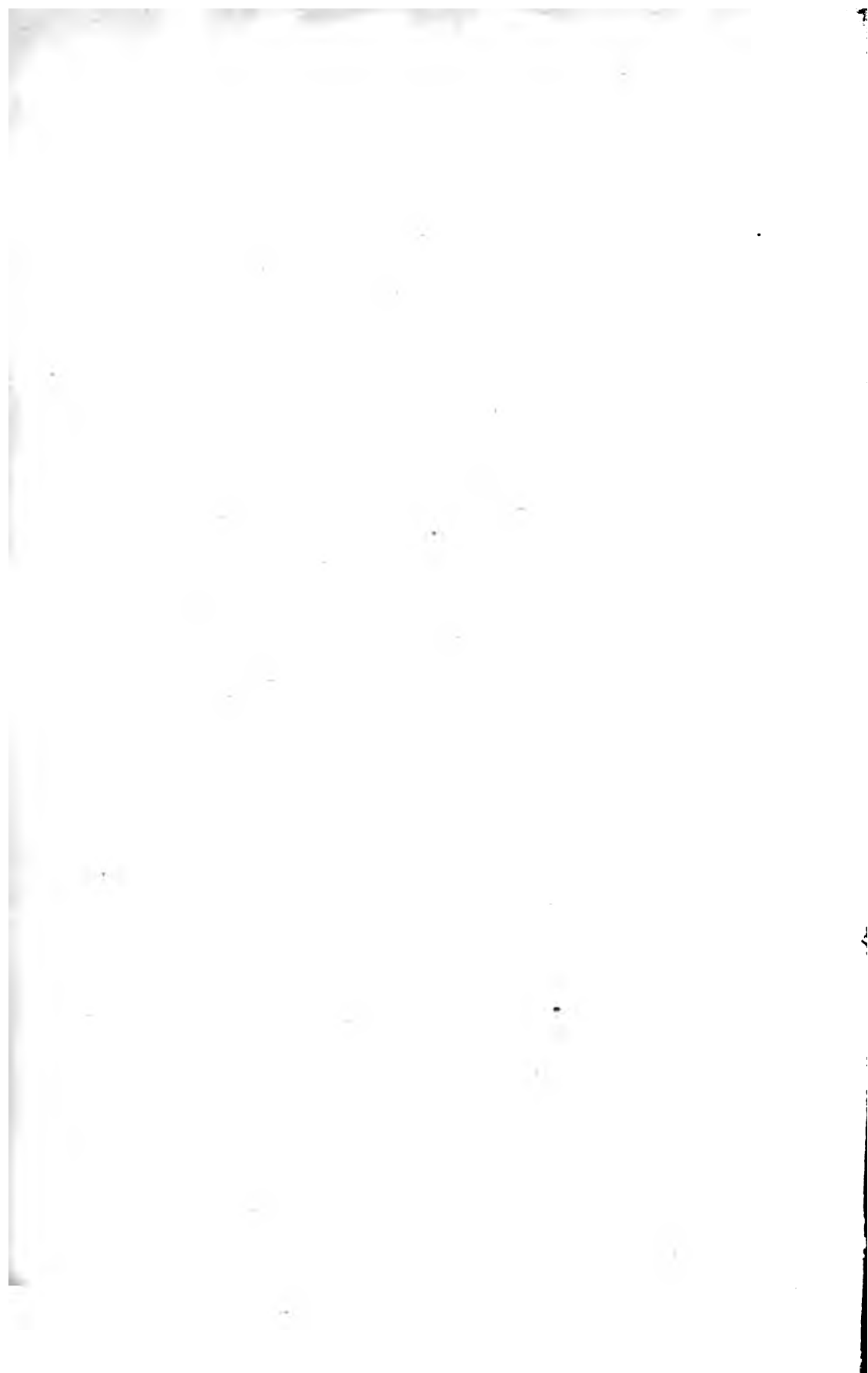
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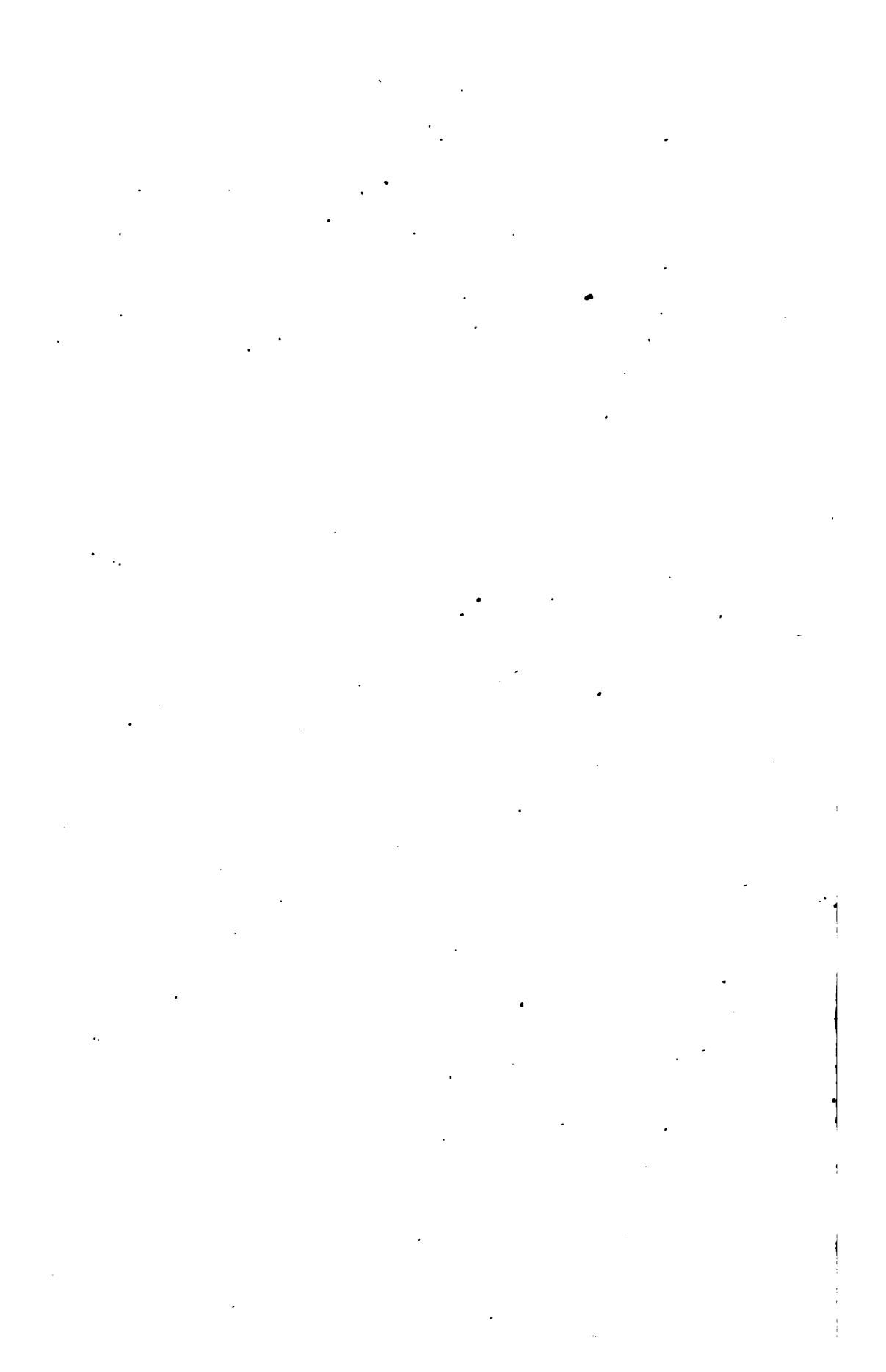












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A PRACTICAL TREATISE

ON THE DIFFERENT BRANCHES OF THE

COMMON LAW.

BY CHARLES PETERSDORFF, ESQ.

OF THE INNER TEMPLE

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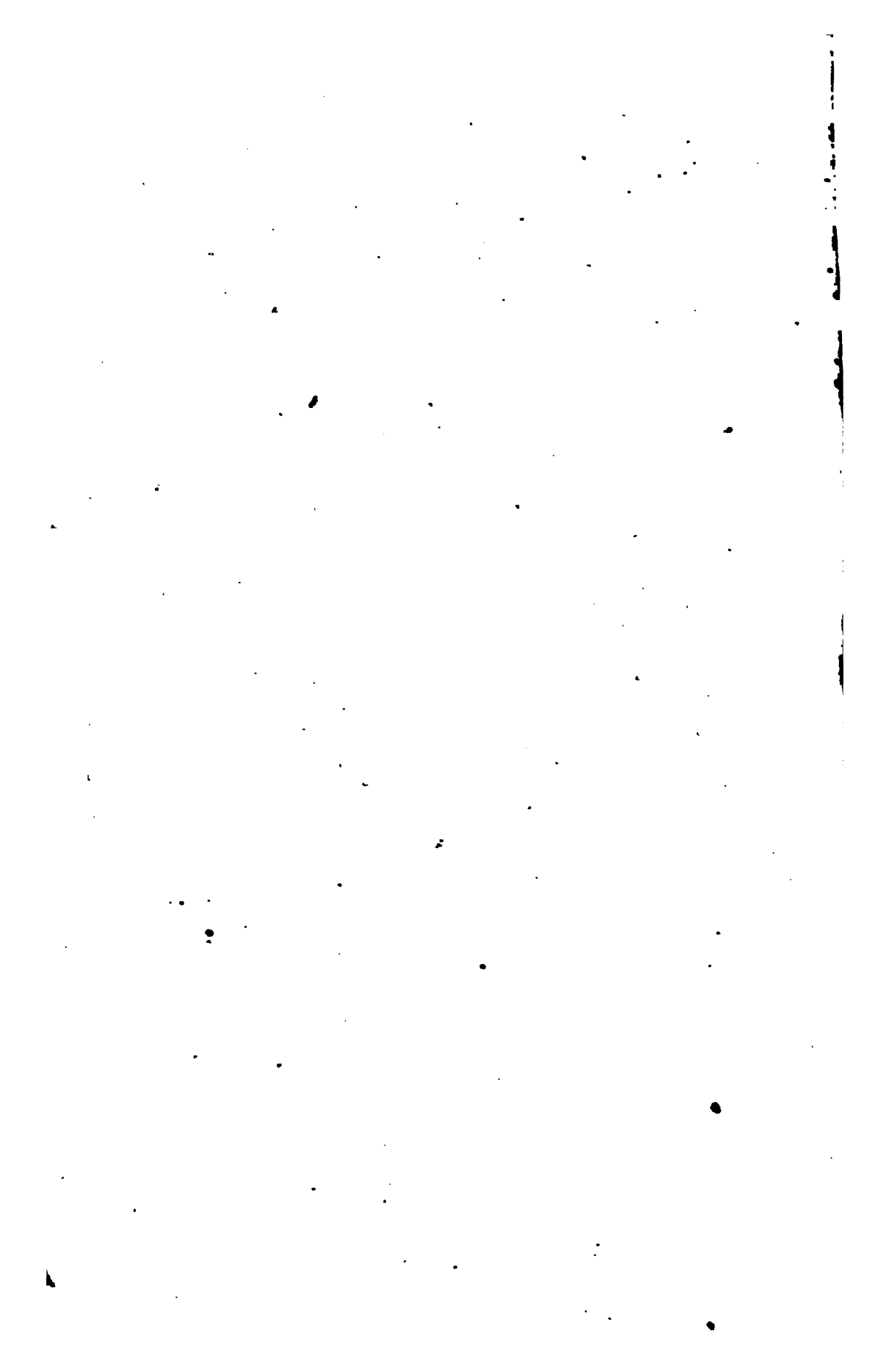


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A
PRACTICAL ABRIDGMENT
OF THE
REPORTS OF CASES
ARGUED AND DETERMINED

IN THE
COURTS OF KING'S BENCH, COMMON PLEAS, AND EXCHEQUER,
FROM THE RESTORATION, IN 1660, TO
MICHAELMAS TERM, 4 GEO. IV.

Inspection.

I. RELATIVE TO CIVIL PROCEEDINGS.

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- (B) — DEPOSITIONS, p. 1.
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I. RELATIVE TO CIVIL PROCEEDINGS.

(A) OF RECORDS.*

(B) OF DEPOSITIONS. See post, div. II.

(C) OF PROCEEDINGS BEFORE INFERIOR JURISDICTIONS.

1 WILSON v. ROGERS. M. T. 1745. K. B. 2. Stra. 1242.

The plaintiff was sued in the Court of Conscience in London, and was taken in execution, for which he brought trespass and false imprisonment, and now moved for liberty to inspect the book of proceedings, which, upon debate, was granted, so far as related to the suit against himself, upon this ground, that every man has a right to look into the proceedings to which he is a party. [2]

2. EDWARDS v. VESEY. T. T. 1735. K. B. Ca. Temp. Hard. 123.

Plaintiff was an under officer to the commissioners of lieutenancy for the City of London, and being fined for some neglect of duty, a distress was taken for the fine, viz. a silver cup; whereupon he brought an action of trespass against the defendant for taking that cup; and the cause being brought down by proviso for trial, the plaintiff made an application that he may have liberty to inspect the books and papers of rates and assessments of the said lieutenancy for the year 1729, and that the said commissioners, or their clerks, might attend with books at the trial.

Per Cur. We cannot make a rule upon them to attend; but let plaintiff have liberty to inspect for the year 1729, and to take copies at his own charge. The next day it was moved for the plaintiff again, that the trial may be put off

* The judicial records of the King's courts are safely kept for the public convenience that any subject may have access to them for his necessary use and benefit; which was the ancient law of England, and is so declared by an act of parliament in the forty-sixth year of Edward the Third.

INSPECTION. — *Civil Proceedings.*

to next sittings, in regard they had not had time enough to make a proper inspection; and had an affidavit of the bulk of the books, &c. But the Court seemed to think it an affectation of delay, because they might have applied sooner for such liberty; but, however, the rule is, if you move to put off the trial on the day of the trial, that you must not only give notice of the motion, but likewise give the other side copies of the affidavits which are to be produced; and that not being done here, they would make no rule.

3. *REX v. SMITH.* M. T. 1718. K. B. 1 Stra. 126.

As for false imprisonment;

A rule was moved for upon a justice of the peace, to produce an examination at a trial; and the Court doubting, it was adjourned. And afterwards the Chief Justice delivered their opinion. Where things are evidence of themselves, as corporation books, we make no rule to produce them, but only that the party may have copies, which copies are evidence. But this examination is not evidence of itself, without proving the hand of the party; and so it is of warrants and affidavits, and therefore a copy of them is no evidence; and we must have the original, for nothing else concludes the party. Make the rule, that the justice *produc' faciat* (not *quod producat*) the examination at the trial, and give the party a copy in the mean time.

Though in other cases the right has been refused;

[3]

4. *GROEVOLT v. BARWELL.* 1 Ld. Raym. 253; S. C. Carth. 421; Id. 491. S. C. This was an action of false imprisonment against the defendants, who justified as censors of the College of Physicians, by virtue of their charter, by which charter they have power to fine and imprison, *pro non bene intendo facultate medicinar*; they then set forth, that the plaintiff, at such a time and place, had administered unwholesome medicines to A. B., and so justified the taking and imprisoning. The counsel for the plaintiff moved, that the registrar of the college should permit the plaintiff to have copies of the proceedings and judgment, to enable him to reply to the defendants' plea in justification; and in support of the application it was said, that the plaintiff was a party to the judgment, and therefore had a right to a copy, and that it is the usual practice, if an action is brought for a false return to a *mandamus*, upon which the party is returned to be disfranchised, the King's Bench will make an order for the plaintiff to have recourse to the public books. But the Court refused a rule, saying (as Lord Raymond reports the case), that they could not oblige the College of Physicians to permit the plaintiff to have a copy of their proceedings; for they act in a judicial manner by authority of an act of parliament, and therefore it shall be presumed that they have done right. The report of this case by Carthew differs materially from that by Lord Raymond. Carthew reports, that the Court admitted the rule for inspecting the proceedings to be usual for the sake of evidence after issue joined, but not by way of assisting the party to plead. The reason given in Lord Raymond's report (namely, that the proceedings must be presumed to be regular, since the college acted in a judicial manner, by authority of an act of parliament,) seems to proceed upon the supposition that the proceedings were truly and correctly set out in the defendant's plea; and on a demurrer (which admits all the facts in justification) that reason would have been conclusive; it might then have been justly said, against the demurrer, that the defendants having shown their authority over the plaintiff, and the fact for which he had been punished being within their jurisdiction as censors, and not traversable in this collateral suit, they could not be liable to an action for what they had done within the limits of their jurisdiction, and in the discharge of their judicial powers. But if, instead of demurring in such a case, he had admitted the warrant under which the defendants arrested him, and replied, that "they had committed the trespass of their own wrong," and without the residue of the cause alleged in their plea, it would then have been competent for him to show that the defendants had exceeded their jurisdiction; and for the purpose of enabling him to be prepared with his defence, the plaintiff seems to have been entitled, at least after issue joined, to an inspection of such proceedings as had been instituted against himself.

5. *ABERY v. DICKENSON*. M. T. 1775. K. B. Sayer. 250.

Upon a motion for a rule to inspect and take copies of the books of the commissioners for licensing hackney coaches, it appeared that the defendant was an officer under the commissioners; and that the action was an action of trespass, brought against him for taking a distress for a penalty inflicted by the commissioners upon the plaintiff. A rule was refused. And, by the Court, as the commissioners are not parties to the action, the plaintiff ought not to have the liberty of inspecting and taking copies of their books.

(D) OF BOOKS OF PUBLIC OFFICES.

1. *WARRINER v. GILES*. M. T. 1733. K. B. 2 Stra. 954.

After the fire of London, power was given to the city to set out the public markets, which was done in a very accurate manner, and entered in their books: an ejectment was brought by the lessee of one of the markets, wherein the boundaries were in question. And it was moved on behalf of the plaintiff to have liberty to inspect the books and take copies, which was granted. And the Court compared it to the case of court-rolls, which are not considered as the evidence of the lord, but in the nature of public books, for the benefit of the tenant as well as the lord.

2. *COX v. COPPING*. E. T. 1785. K. B. 5 Mod. 395.

In an action of ejectment by an impropriator against the church-wardens of a parish, where a rule was applied for on the part of the plaintiff, suggesting that the parish books would make the titles appear, and that they were the common books belonging to the parish at large; but the Court were of opinion, that when the person claims a distinct interest from that of the parish, it is not reasonable to compel the parish to discover their title by showing their books, which are kept only for their own use.

3. *SHELLING v. FARMER*. M. T. 1725. K. B. 1 Stra. 646.

In an action for trespass and imprisonment for acts done in the East Indies, the plaintiff laid them all (being transitory) in London, and *inter alia* declared for seizing the plaintiff's house situate *apud London præd' in parochia et warda præd'*. It was objected, for defendant, that the trespass as to the house was local, and they could not give evidence of seizing a house in the East Indies. And Eyre, C. J., refused to let the plaintiff give evidence as to the house, comparing it to the case of rent for a house at Barbadoes, where it has been held you may bring covenant for the rent in England, but an action of debt, which is local, cannot be brought here. In the course of the evidence it appeared the action was brought against the defendant for an imprisonment by him, as governor of a factory in the East Indies; and for his defence he alleged that he had orders from the company so to do, and appealed to the company's books of letters, &c., which he desired might be produced. Counsel attended on behalf of the company to desire to be excused, alleging, that these were not of the nature of public books, which every body has a right to have access to, and of which copies are evidence; whereas these related only to the private transactions of the company: and it might be of mischievous consequence, if in every action wherein the company is concerned, they should be obliged to lay open the secrets of their trade, and disclose to all the world a whole series of letters and correspondence between them and their agents: however, the books and papers were there, and the counsel submitted to the directions of the Court. The Chief Justice said he would not oblige the company to produce them, whereupon they were carried back again to the East India-house. The action was against the defendant as a deputy governor; and on not guilty, he gave in evidence a release given by the plain-

* The same objection might have been made in the other cases which have been before cited, but the Court there allowed an inspection (although the persons who had the custody of the goods were not parties to the suit), because the plaintiff, who applied for the rule, was the object of the proceedings under which defendants had acted. The authorities before cited seem, therefore, to establish the principle, that if proceedings have been instituted by an inferior jurisdiction, the party affected by them ought to be allowed to take a copy of such as relate to himself in any subsequent suit, in which the regularity of those proceedings may be disputed.

As in trespass for taking a distress for a penalty under an order of earl commissioners, on the ground that the commissioners were not parties to the suit.*

[4] Persons interested in the books of public offices, as to boundaries, have a right to inspect.

But parish books form an exception to this rule, at least as regards matters distinct from the parish;

So do the books of a public or private company;

[5]

tiff to the East India Company in pursuance of an award, whereby reciting he had sustained several injuries by the Company's agents, particularly the deputy-governor, therefore they award him 1,000*l.*, and order him to give a general release. The defendant being no party to that release could not plead it, but the Chief Justice allowed him to give it in evidence in mitigation of damages; and these not being private papers, consented on behalf of the company that they should be produced.

4. *CREW V. BLACKBURN.* Cited *H. T.* 1748. *K. B.* 1 *Wils.* 240; *S. C.* 2 *Stra.* 1005.

And in fact inspection will not be allowed to any public books for in direct purposes.

Actions *qui tam* against the defendant as a clerk in the Post-Office, for a penalty of 50*l.* for interfering in the election of the member to serve in parliament; a motion was made by the plaintiff for leave to inspect the books of the Post-Office, alleging, that those books were touching the public revenue, in which every subject has a right and interest; but the Court refused to grant the motion, and confined themselves to this, viz. that the question in the cause not concerning any transaction in the Post-Office (for which transaction only those books are kept), denied to grant the rule.

(E) OF COURT ROLLS.

1. *ROE V. ALMYER.* *H. T.* 1753. *C. P.* *Barnes*, 236. *ADLINGTON V. CLODE.* 2 *Black.* 1030.

Court rolls are liable to inspection;

This ejectment was brought on the demise of the lord of a manor against the defendant his tenant, to recover possession of a copyhold estate, which the lord insisted was forfeited by reason of tenant's not rebuilding a cottage. Defendant moved for leave to inspect and take copies at his own expense of the court rolls of the manor; but the motion was denied for want of an affidavit that a previous application had been made on defendant's part to the lord or his steward for an inspection and copies, which were denied. Though this is a dispute merely between the lord and his copyhold tenant, touching a forfeiture, yet the same previous application is necessary as in other cases. The tenants of a manor are the only persons who have a right to inspect the court rolls; the Court always expected an affidavit that the person on whose behalf the motion is made is a tenant of the manor, and has applied and been denied as above mentioned.

[6]

At least as regards the tenants.

2. *TALBOT V. VILLEBOYS.* Cited 3 *T. R.* 142.

In trover by bankrupt's assignees, the question being whether the bankrupt sold the goods, the defendant had leave to inspect his sale books.

In an action of trespass, where the question was, whether the place in which the trespass was alleged to have been committed was within the manor of the plaintiff or part of a manor claimed by the defendant, the Court held that the defendant, who, as it appeared from his affidavit, was not a tenant of the plaintiff's manor, nor claimed any interest under him, could not be entitled to an inspection.

(F) CORPORATION BOOKS. See *ante*, vol. vi. tit. Corporation.

(G) OF PRIVATE BOOKS.

WHITTER AND OTHERS V. CAZALES. *M. T.* 1788. *K. B.* 2 *T. R.* 683.

In trover for goods by the assignees of a bankrupt, where the defence was, that they were sold by the plaintiff, and the defendant moved for leave to inspect the bankrupt's sale books, the Court granted the application, and gave him time to plead, in order that he might gain time to obtain a discovery from the Court of Chancery in the mean while.

II. RELATIVE TO CRIMINAL PROCEEDINGS.

1. *GROENVOLT V. BARWELL.* 1 *Lord Raym.* 253.

Lord Holt has laid it down as a general rule of law, that if a person be indicted for felony and acquitted, and means to bring an action (without sufficient cause) the judge will not permit him to have a copy without leave.

2. *VANDERCOME V. ABBOTT.* 2 *Leach*, *C. L.* 821.

Formerly the courts were very strict in granting a copy of an indictment;*

In fact they would in one case on

In this case, the prisoners after their acquittal applied for copies of the several indictments for the purpose of assisting them in their plea of *autrefois acquit*; the Court, however, refused to grant them copies, but ordered the offi-

* But see 7 & 8 *Geo.* 4. c. 28. See *ante*, vol. 10, p. 501.

cer to read over the indictments slowly and distinctly, which was accordingly ly allow it to be read.
done.

3. *LLGALL v. TOLLERREY.* 14 East, 302.

On the part of the plaintiff in this case, the clerk of the court of quarter sessions before which the indictment had been tried produced a copy, which, for want of an order, was not allowed to be read, and the plaintiff was in consequence nonsuited. But the Court of King's Bench were of opinion that the evidence ought to have been received, and set aside the nonsuit. It is very clear, said Lord Ellenborough, C. J., that it is the duty of the officer charged with the custody of the records of the court not to produce a record but upon competent authority, which at the Old Bailey is obtained upon application to the Court, pursuant to the order that has long prevailed there, and, with respect to the general records of the realm, upon application to the Attorney-General. But if the officer, even without authority, shall have given a copy of a record or produce the original, and that is properly proved in evidence, I cannot say that such evidence shall not be received. He may incur the penalty of his contempt of the Court, and may be warned him to do. But still I cannot help thinking that the rule laid down by Lord Ch. J. Lee, in the case of *Jordan v. Lewis*, is the correct rule. The order made at the Old Bailey was there read by way of objection to the evidence offered; but the Chief Justice in that case said, that he could not refuse to let the plaintiff read the copy of the indictment, though obtained without any order of the Court for that purpose.

But if a copy be obtained with out an order it cannot, it seems, be rejected on that ground.
[7]

4. *MONSON v. KELLY.* T. T. 1761. K. B. 1 Blac. 385.

This action came on to be tried for a malicious prosecution, in indicting the plaintiff for keeping a disorderly house. To prove the fact, the clerk of the peace for Westminster attended with the original record of the acquittal. It was by counsel objected, that there ought to be a copy of the record granted by the Court before which the acquittal is had, in order to ground an action for a malicious prosecution. But it was ruled by Lord Mansfield, that though this is necessary where the party is indicted for felony, yet the practice is otherwise in case of misdemeanours.

The preceding cases are applicable to felonies and not misdemeanours, and therefore as to the latter, it is demandable;

5. *REX v. MIDLAM.* T. T. 1765. K. B. 3 Burr. 1721.

The counsel on behalf of the prosecutor showed cause against a rule which had been made upon him to show cause why he should not be directed by the Court to forbear, and not to proceed to tax the prosecutor his costs in these causes, relative to the affirmance of the convictions against the defendant in these causes; and also why the bond entered into by or on the behalf of the defendant, on allowing the certiorari, should not be delivered up to the said defendant, or his clerk in court, cancelled. This certiorari was brought for removing a conviction upon the game laws, and the present rule was grounded on an affidavit of hardship and oppression upon the defendant, namely, that, although the defendant had paid the forfeiture upon the conviction, yet an action had been brought against him for the same offence; and when he wanted to plead this conviction in bar of the action, the justice had refused to give him a copy of it, and he was obliged to remove it by certiorari, and the prosecutor set it down in the paper and got it affirmed, and then the prosecutor became nonsuited in the action.

As the copy of the conviction be fore a magistrate;

Per Cur. The justice ought to have given the defendant a copy of the conviction, for it was a record, and the defendant was entitled to it. And he ought to have been allowed the expense of his necessarily bringing a certiorari in costs upon the nonsuit; for it was necessary to his defence in the action.

[8]

6. *REX v. HOLLAND.* T. T. 1792. K. B. 4 T. R. 691.

An information was filed against an officer of the East India Company, on charges of delinquency, founded upon the report of a board of inquiry in India. right to in

But the person has no right to in

respect the positions of the witnesses who are to appear against him.

The application for the right to inspect must be supported by an affidavit stating the grounds.

And that the applicant has no copy or counterpart thereof;

Which, if satisfactory to the court is a ground for making the rule absolute in the first instance.

[9]

The motion should, it seems, be made after issue joined

The Court of King's Bench were of opinion, that the defendant had no right to have an inspection of that report, and that the Court had no discretionary power to grant it. The practice on indictments at common law, and on informations upon particular statutes, (said Mr. Justice Buller, on that occasion,) shows it to be clear, that the defendant is not entitled to inspect the evidence on which the prosecution is founded till the hour of trial.

III. RELATIVE TO THE APPLICATION FOR.

1. ROE V. AYLMAR. H. T. 1753. C. P. Barnes, 236.

Per Cur. The application for the right to inspect must always be supported by an affidavit, to show the person on whose behalf it is made and the general grounds for the application.

2. MORROW V. SAUNDERS. T. T. 1819. C. P. 1 B. & B. 318; S. C. 3 Moore, 671.

This was a motion to obtain a rule for the inspection of certain partnership deeds, founded on an affidavit, stating that this action was brought for not complying with a stipulation therein contained; and after stating that this deponent verily believes that the defendant has them in his possession, it alleged that this deponent cannot prosecute his action unless he obtains a copy, and that he never had the original deed, or any counterpart thereof, in his possession. On showing cause against this application, it was contended that this affidavit was not tenable, as it does not specify what species of action the plaintiff intends to bring, and relied on the case of *Street v. Brown*, 1 Marsh, 410.

Per Cur. Had there been more than one instrument, we should not have interfered; but now it is compulsory on us, for it would be impossible that the plaintiff can have no remedy. Here the affidavit is sufficient; for it was unnecessary to state the cause of action, some alleging that the plaintiff had not the deed, or any copy thereof, in his hands. Therefore the rule must be absolute.

3. REX V. SHELLY. H. T. 1789. K. B. 3 T. R. 141.

A rule to show cause why an information in the nature of *quo warranto* should not be filed against the defendant, to show by what authority he claimed to be a burgess of the borough of Horsham; afterwards motion was made for another rule on behalf of the three relators, who were burgage tenants of the manor, and entitled to be summoned to the court-leet and court-baron, (and which was also a sort of corporate court) to inspect the court-rolls and books of the manor, (leave having been refused by the lord,) alleging, that burgage tenures gave title, and that evidence relating to these would be found by such an inspection; and cited *Wood v. Whitcomb*, E. 6 Ann. C. B. 12 Vin. 146. where it was considered as a matter of course to grant an inspection of the court-rolls in a question between two tenants. Buller, J. said, that he remembered before he came to the bar it was the constant practice to grant these motions as of course; and soon after he came upon the bench there were one or two cases of this sort, wherein he thought that it would be going too far to grant an inspection, but the rest of the court overruled him, and there the matter had rested ever since. That the three persons making this application having all of them burgage tenures had an interest in knowing who besides themselves had the same rights. Rule absolute in the first instance.

4. HODGES V. ATKIS. H. T. 1773. K. B. 3 Wils. 398; S. C. 2 Blac. 877.

Trespass for taking the plaintiff's goods; the defendant, as servant to the corporation of Shrewsbury, justifies taking the plaintiff's goods as a distress for toll through the streets of Shrewsbury, which the plaintiff refused to pay. And before the plaintiff had replied, or any issue was joined, it was moved on the behalf of the plaintiff for a rule to have liberty to inspect the public books and records of the corporation of Shrewsbury. For the defendant it was objected, that the plaintiff being a stranger to the corporation, has no right to inspect the books thereof; that issue not being joined, it is not known what will be the point to be tried; that the plaintiff has not yet applied to the corporation and been refused the liberty of inspecting the books; this motion is pre-

mature, and is the first of the kind, for it is a motion to furnish the plaintiff with matter for his reply to the defendant's plea. For the plaintiff it was answered, that there are cases where strangers have had rules for liberty to inspect the books of adverse parties; and cited 2 Barnes, 194. the *Browers' Company v. Benson*, which was an action brought on bye-laws against the defendant exercising the trade of a brewer, but no member of the company.

Per Cur. Bye-laws affecting strangers interest them therein; the rule there was made absolute for the defendant to inspect the company's books and take copies. Lord Chief Justice. Do you lay it down in general, that a stranger has a right to inspect the books of a corporation? How has a stranger to a corporation more right to inspect their books than the books of a private person? While Lord Camden sat here, there was the like motion in the like action of trespass, where the defendant justified (under the corporation of Ipswich) for distraining for a toll for repairing the quay there, and the motion was refused, the plaintiff there being a stranger to the corporation; and I am sure, in many cases like the present, the motion has been refused; however, I shall give no absolute opinion upon the present motion, because issue is not yet joined, nor has the plaintiff applied to be permitted to inspect the books of the corporation and been refused, and that is a sufficient reason for not granting the rule at present.

5. *REX v. LUCAS*. T. T. 1808. K. B. 10 East, 235.

Application for a *mandamus*. Lord Ellenborough, C. J. I do not know why there should be any cause depending, in order to found an application of this sort. This is not the impertinent intrusion of a stranger, but the application of one who is clearly entitled to the copyhold, unless there be some conveyance of it by those under whom he claims: he may therefore well require to see whether there appears upon the rolls to be any such conveyance.

[10]
If an action be pending, if there be no action, the inspection must be gained by a *mandamus*.

Installments. See *tit.* *Composition with Creditors; Debt.*

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I. AGAINST FIRE.

1. *BUFE v. TURNER*. M. T. 1815. C. P. 6 Taunt. 338; S. C. 2 Marsh. 46.

This action was brought by a merchant, native of, and resident at, Heligoland, against the defendants, as directors of the Phoenix Fire-office, on a policy of insurance effected on the 25th of July, 1814, on a warehouse situate in the lower town of Heligoland, for three months, as by the plaintiff's letter on the 11th of July, 1814. The defendant pleaded, that the time when the letter ordering the insurance was written the premises were in imminent danger of being burnt, which the plaintiff knew, but concealed, in consequence of which fraudulent concealment the policy became void. The jury found a verdict for the defendant. On motion to set this verdict aside, the facts of the case were shortly these.—The plaintiff was in possession of two warehouses in Heligoland; that which was insured was separated only by one other building from the warehouse of another person, which was on fire on the night of Saturday, the 11th of July. The fire was supposed to have been extinguished by eight o'clock in the evening, but it was considered necessary to watch the premises all night, and on the Monday morning following it broke out again, consumed the warehouse in which it originally commenced, and communicating through the intervening building with the warehouse which was the subject of this insurance, consumed that also. On the night of the 11th, after the bag of let-

This is a contract by which the insurer undertakes, in consideration of the premium, to indemnify the insured against all losses which he may sustain in his house, goods or merchandize, by fire, within the time limited in the policy.

Insurances against fire being within the 14 Geo. 3. c. 48. it is requisite that the insured should have an interest in the property at the period of insuring, and at the time the loss happened; and in the case of loss, the insured will be entitled to recover only to the extent of his interest; see 2 Atk. 255.

A policy of insurance against fire is not, from its nature, assignable, and the interest in it cannot be transferred, unless the previous consent of the insurers be obtained; and where the insured dies, the interest shall remain to his heir or personal representatives to whom the property insured may respectively belong, provided, before any new payment be made, they procure their right to be indorsed on the policy, or the premium to be paid in their name; see 2 Atk. 564.

The insurance companies in general reserve to themselves an option of reinstating the premises, or paying the amount of the insurance money, 18 Ves. 119. And the building act, 14 Geo. 3. c. 78. s. 83., empowers the governors or directors of the several insurance offices, upon the request of any persons interested in or entitled to any houses or buildings which may be burned down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or occupier, or other person, who has insured, has been guilty of fraud, or of wilfully setting houses or buildings on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing the property burned or damaged, unless the parties claiming the insurance money do, within sixty days after claim is adjusted, give sufficient security to the governors and directors of the office, that the insurance shall be laid out and expended, or unless the insurance money be within that time settled and disposed of amongst the contending parties, to the satisfaction and approbation of the governors and directors. Although, therefore, a policy, as a personal contract, does not pass with the property insured, yet a covenant to insure to a certain amount entered into by a lessee or other person having an estate in land is so far beneficial to the property, that in cases to which this statute applies, it will run with the land, and an assignee entitled to the benefit of covenants real may maintain an action on the covenant to insure, if it be not observed; 5 B. & A. 1. So insurance money received by a tenant for life in respect of a house burned down, and kept distinct by him as such, was held in a court of equity to be applicable to the uses of a settlement of real property, and not to pass with a bequest of the personality; 2 Madd. Rep. 278.

ters had been made up for England, the plaintiff wrote to his agent here, drily desiring that the warehouse in question might be insured, and taking no notice of the other warehouse which he had in town, which letter was not sent in the regular way, but was given to the master of the boat which carried the letter bag. The jury thought that a fact which bore so hard upon the safety of the premises insured as the fire of the 11th ought to have been communicated; and though they acquitted the plaintiff of any fraudulent intention in the concealment, they still thought that the defendants were not on equal terms with the insured. Gibbs, C. J. added, that under the circumstances of the case, he could not but think that the jury were warranted in the verdict that they had given; and the rest of the Court concurring, the rule was refused.

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Hence, a coffee-house is not to be viewed as an inn with in a policy rendering the latter liable to double hazard.

2. *DOE, D. PITT, V. LAING.* M. T. 1814. N. P. 4 Camph. 76.

In an action on a policy, it was then insisted that the policy was void, as it enumerates several trades which are considered as double hazardous, and declares that no insurance shall be valid upon premises where any of these are carried on, unless a premium be paid in proportion. Among these trades is that of an inn-keeper. Now, Grigsby's coffee-house must be considered an inn; people from the country lodge there as in an inn; and as the premium paid on this insurance was the usual premium on common risks, the policy was void, and the premises had not been insured.

Lord Ellenborough. Grigsby's coffee-house, I happen to know, is like any other coffee-house in the metropolis; and I think a coffee-house is not an inn within the meaning of the policy. Horses, waggons, and coaches come to an inn; there are stables and outhouses attached to it; people are going to these with lights at all hours. Hence there is an increased danger of fire, and the trade of an inn-keeper is considered double hazardous, but the trade of a coffee-house-keeper is of a very different description.

3. *WATCHHORNE V. LANGFORD.* T. T. 1814. N. P. 3 Camph. 422.

The property intended to be comprehended in the policy should be accurately set out.

The plaintiff insured his stock in trade, household furniture, linen, wearing apparel, and plate. A fire happened in the plaintiff's premises on the 13th of August, 1812, and consumed (amongst other things) a large stock of linen drapery goods, which a short time before he had purchased on speculation.—One item of the plaintiff's demand was for the value of these goods, which, it was contended, were protected by the policy under the denomination of "linen."

Lord Ellenborough. I am clearly of opinion that the word "linen" in the policy does not include articles of this description. Here we may apply *noscitur a sociis*. The preceding words are "household furniture" and the succeeding "wearing apparel." The "linen" must be "household linen or apparel."

4. *TARLETON V. STAINFORTH.* T. T. 1794. K. B. 5 T. R. 695; S. C. 1 B. & P. 471; S. C. 3 Anst. 707.

The duration of the policy is limited to the payment of the premium, and where the premium is to be paid within fifteen days after the expiration of the time of insurance, it merely vents a right of insurance within that time, if the insurer agrees to the same.

The declaration stated, that by a deed-poll, commonly called a policy of insurance, dated the 10th of December, 1788, made by the defendants, three of the trustees, or acting members of the society of the Liverpool Fire-office, to the plaintiffs, (which recited that the plaintiffs had paid 7l. 10s. to the Liverpool fire-office, and had agreed to pay to them, at their office, 7l. 10s. on the 10th of June, 1789, and the like sum every six months during the continuance of the policy, for insurance from loss by fire on goods, &c. not exceeding 6,000l.) it was declared that, from the date of the policy, and as long as the plaintiff should duly pay the sum of 7l. 10s. at the times and places aforesaid, and the trustees, or acting members of the society should agree to accept the same, the fund of the society should be liable to pay to the plaintiffs such damages and loss as the plaintiffs should suffer by fire, not exceeding 6,000l. according to the exact tenor of their printed proposals, dated January 1st. 1777. The declaration then averred, that in those printed proposals was contained this article:—"3rd. On bespeaking policies, all persons are to deposit 9s. 6d. for the policy, stamp duty, and mark, and shall pay the premium to the next

* Because a material misdescription vitiates the policy, as, if a building be described as the first loss instead of the second; see 3 Dow, 255.

quarter day and mark, and from thence for one year more at least, and shall, [16] as long as the managers agree to accept, within 15 days after the day limited, the then respective policies, upon forfeiture of the benefit thereof; and no insurance is to take place until the premium be actually paid by the insured, his, her, or their agent or agents." It then stated, that all payments due upon the policy were paid by the plaintiffs before the loss in question, according to the form and effect of the third article; that at the time of the printed proposals in 1777, and until the 16th of February, 1785, the society never insured for less than a year; after which, and until the making of this policy, they insured for certain periods of time less than a year; that all insurances made by the society for less than a year have been made by certain deeds-poll, of like substance and effect with the deed-poll above set forth, and referring in like manner to printed proposals of the society, dated the 1st of January, 1777, and which said printed proposals, as to the said third article thereof, have, during all the time last mentioned, remained and continued wholly unaltered; that divers payments of the premiums for insurances for periods of time less than a year have been made to and received by the society within 15 days after the several days limited by the respective policies, containing such insurances, without any objection on the part of the society, and such policies have thereupon continued and remained in force. It then stated a loss of the plaintiff's goods by fire to the amount of 6,000*l.*; after the making of the said deed-poll, and whilst the same remained in full force, to wit, on the 11th of December, 1789, and before the expiration of 15 days after the day limited by the policy in that behalf, and before any disagreement or refusal of the trustees, or acting managers of the society to accept the sum of 7*l.* 10*s.* every six months, according to the effect of the policy, or to continue the policy; notice to the defendants, &c., and non-payment by them, &c. In the second count it was averred, that the true intent and meaning of the policy was, that the plaintiff should be insured against any loss happening within 15 days after the particular days of payment, unless before the loss the society should have refused to renew the policy, or unless the plaintiff should have omitted to tender the sum due after those 15 days. It then stated, that all payments (except that of 7*l.* 10*s.* after mentioned) which had ever become payable by virtue of the policy and of the printed proposals, were before the loss made by the plaintiffs to the society at their office; and that afterwards, and before the expiration of 15 days from the 10th of December, 1789, being the day limited by the policy, to wit, on the 11th of December, 1789, the plaintiffs tendered to the society, at their office, the sum of 7*l.* 10*s.* the managers of the society not having then, or before, in any manner disagreed or refused to accept the same according to the form and effect of the third article of the printed proposals, and then and there requested the managers to accept the same, &c. [17] The third count varied from the second in this respect; that instead of setting forth the third article of the printed proposals *verbatim* it stated the effect of it thus: "That so long as the managers shall agree to accept of the same, all payments shall be made at the said office of the society within fifteen days after the day limited by the respective policies for payment thereof, upon forfeiture of the benefit thereof," &c.

Per Cur. Strictly speaking, the policy ought to have been renewed on the day when the former half year expired. Were it not for the allowance of the fifteen days, a new policy, on new stamps, must be made every year; but to guard against any inconvenience arising from the negligence of the assured, a period of fifteen days is allowed to them, provided the premium be tendered by them and accepted by the trustees. But the assured are at their own risk during this interval; for if any accident happen before the premium is actually paid, they stand uninsured. It appears to us, both from the words of the printed proposals and the intention of the parties, that the defendants are not liable in this case, because the parties had not agreed for the next half year when the loss happened. There would be great injustice in putting any other construction on this policy; for then the assured would have the interval to con-

consider whether or not he would insure for the next half year. If no loss happened during the fifteen days perhaps he would not insure; but in the event of a loss during that period, he would insure after it happened. But in order to make the defendants liable, as on a contract, both the contracting parties must be bound; whereas, according to the plaintiff's construction, only the defendants would be bound for the fifteen days. The defendants are not answerable in this case, because the policy was not in force at the time when the loss happened.

5. *SALVIN v. JAMES*. T. T. 1805. K. B. 6 East. 571; S. C. 2 Smith, 646.

In fact, the fifteen days are allowed only in case it is intended to renew the policy, and that if the office gives notice before or during the fifteen days that they will not accept the premium, and a loss happens afterwards during the fifteen days, the office is not liable.

[18]

By a policy under seal, referring to certain printed proposals, a fire-office insured the defendant's premises from 11th November, 1802, to 25th December, 1803, for a certain premium, which was to be paid yearly on each 25th of December, and the insurance was to continue so long as the insured should pay the premium at the said times, and the office should agree to accept it. By the printed proposals it was stipulated, that the insured should make all future payments annually, at the office, within fifteen days after the day limited by the policy, upon forfeiture of the benefit thereof, and that no insurance was to take place till the premium were paid; and by a subsequent advertisement (agreed to be taken as part of the policy), the office engaged that all persons insured there, by policies for a year or more, had been, and should be, considered as insured for fifteen days beyond the time of the expiration of their policies. The Court held, notwithstanding this latter clause (the insured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, or otherwise they would not continue the insurance, and the insured having refused to pay such advanced premium), that the office was not liable for a loss which happened within fifteen days from the expiration of the year for which the insurance was made, though the insured, after the loss, and before the fifteen days had expired, tendered the full premium which had been demanded; for the effect of the whole contract, &c. taken together, was only to give the insured an option to continue the insurance or not, during the fifteen days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not, before the end of the year, determined the option, by giving notice that they would not renew the contract.

6. *WORSLEY v. WOOD*. T. T. 1796. K. B. 6 T. R. 710.

To render the office responsible the proposals in the policy must be complied with;

Action on a policy of insurance. Persons sustaining any loss or damage by fire are forthwith to give notice thereof at the office, and, as soon as possible afterwards, to deliver in as particular an account of their loss and damage as the nature of the case will admit, and make proof of the same by their oath or affirmation, according to the form practised in the said offices, and by their books of account, and such other specific vouchers as shall be reasonably required, and procure a certificate under the hands of the minister and churchwardens, together with some other respectable inhabitants of the parish not concerned in such loss, importing that they were well acquainted with the character and circumstances of the person or persons insured, and do know, or verily believe, that he, she, or they really, and by misfortune, without any fraud or evil practice, have sustained by such fire the loss and damage, as his, her, or their loss, to the value there mentioned: but till such affidavit, and certificate of such insured's loss shall be made and produced, the loss-money shall not be payable; and if there appear any fraud of their policies, &c. &c.

The Court were of opinion, that the procuring such certificate was a condition precedent to the right of the insured to recover; and that supposing the minister, &c. had wrongfully refused to grant such certificate, it would not vary the case, the rule being, that if a person undertake for the act of a stranger, that act must be done.

7. *AUSTIN v. DREW*. H. T. 1816. C. P. 6 Taunt. 436; S. C. 2 Monk. 130; S. C. 4 Campb. 360.

And there must be an actual fire.

A policy of insurance (against fire) was effected on the stock and utensils of a sugar-house, the different stories of which were heated by a chimney run-

ning up to the top. By the negligence of the plaintiff's servants in omitting to open the register, the heat was considerably increased, by means of which large quantities of the sugar were spoiled; but no damage was occasioned to any thing but the sugar, and no greater fire existed than on ordinary occasions.

This the Court held not to be a loss within the policy, for the damage was not occasioned by ignition, the fire having always remained where it ought to have been: the injury was attributable to the mismanagement of the register.

S. DRINKWATER v. LONDON ASSURANCE. M. T. 1767. K. B. 2 Wils. 363.

This was an action of covenant against the defendant upon a policy of insurance of a malting office of the plaintiff at Norwich from fire, in which policy there was a proviso, that the corporation should not be liable in case the same shall be burnt by any invasion by foreign enemies, or any military or usurped power whatsoever; and that the defendants had not kept their covenants, to the plaintiff's damage. The defendants plead, 1st. The general issue, that they had not broke their covenants, and thereupon issue was joined. 2dly. They plead that it was burnt by an usurped power. The plaintiff replies, that it was burnt by an usurped power, and thereupon issue was also joined. At the trial a verdict was given for the plaintiff, and 46*l.* damages, subject to the opinion of the Court upon the following case; viz. that upon Saturday, the 27th of November, a mob arose at Norwich on account of the high price of provision, and spoiled and destroyed divers quantities of flour; thereupon the proclamation was read, and the mob dispersed for that time. Afterwards another mob arose, and burnt down the malting office in the policy mentioned; the question was, whether the plaintiff is entitled to recover in this action? The case was twice argued at the bar, and the Court took time to deliberate, after which as the judges differed in opinion, they delivered their opinions *seriatim*.

Mr. Justice Gould was of opinion that the malting office being burnt by the mob, who rose to reduce the price of provisions, the same was burnt by an usurped power, within the true intent and meaning of the proviso in the policy. To show that it was an usurped power for any persons to assemble themselves to alter the laws, to set a price upon victuals, &c., he cited Popham, 122. where it is agreed by the justices, that to attempt such a thing by force is felony, if not treason; and therefore judgment ought to be for the defendants.

Mr. Justice Bathurst. The words "usurped powers" in the proviso according to the true import thereof, and the meaning of the parties, can only mean an invasion of the kingdom by foreign enemies to give laws, and usurp the government thereof; or an internal armed force in rebellion assuming the powers of government, by making laws and punishing for not obeying those laws. The plea alleges, that the malting office was burnt by an usurped power unlawfully exercised, but does not charge that usurped power as a rebellion; that a mob arose at Norwich on account of the price of victuals, and as soon as the proclamation was read, they dispersed; therefore judgment ought to be for the plaintiff.

Mr. Justice Clive. The words must mean such an usurped power as amounts to high treason, which is settled by the 25th of Edward 3; the offence of the mob in the present case was a felonious riot, for which the offenders might have suffered, but it cannot be said to be an usurped power; therefore I am of opinion that judgment should be given for the plaintiff.

Lord Chief Justice Wilmot. Upon the best consideration I am able to give this case, I am of opinion, that the burning of the malting office was not occasioned by an usurped power, within the meaning of the proviso. Policies of insurance, like all other contracts, must be construed according to the true intention of the parties. Although the counsel on one side said that policies ought to be construed liberally, on the other side that they ought to be construed strictly, in a doubtful case I think the turn of the scale ought to be given against the insurer, because he has not fully and clearly explained himself. The imperfection of language to express our ideas is the occasion that words have equivocal meanings; and it is often very uncertain what the parties to a

The policy usually provides that "no loss or damage by fire happen[ing] by any invasion, foreign or any military or usurped power what[ever], will be made good by the insurer;" held that the words "usurped power" mean an invasion from abroad, or an internal rebellion, and not the power of a common mob.

- [20] contract in writing mean; when the ideas are simple, words express them clearly; but when they are complex, difficulties often arise, and men differ much about the idea intended to be conveyed by words. In the present case, which is the true idea conveyed to the mind by the words "usurped power?" The rule to find it out is to consider the words according to Horace, *arbitrium est ei jus ei norma loquendi*. My idea of the words "burnt by an usurped power," from the context is, that they mean burnt or set on fire by occasion of an invasion from abroad, or of an internal rebellion, when armies are employed to support it, when the laws are dormant and silent, and firing of towns are unavoidable: these are the outlines of the picture drawn by the idea which these words convey to my mind. The time of the incorporation of the society of the London Assurance Company was soon after a rebellion in this kingdom, and it was not so romantic a thing to guard against fire by rebellion as it might be now; the time therefore is an argument with me, that this is the meaning of these words. Rebellious mobs may be also meant to be guarded against by the proviso; because this corporation commenced soon after the riot act, and if common mobs had been in their minds, they would have made use of the word "mob." The words "usurped power" may have a great variety of meanings, according to the subject matter where they are used, and it would be pedantic to define the words in their various meanings; but in the present case they cannot mean the power used by a common mob. It has not been said that if one or fifty persons had wickedly set this house on fire, that it would be within the meaning of the words "usurped power." It has been objected, that here was an usurped power to reduce the price of victuals; but this is part of the power of the crown; and therefore it was an usurped power; but the king has no power to reduce the price of victuals. The difference between a rebellious mob and a common mob is, that the first is high treason, the latter a riot or a felony. Whether was this a common or a rebellious mob? The first time the mob disperse they hear the law, and immediately obey it. The next day another mob rises on the same account, and damages the houses of two bakers; thirty people in fifteen minutes put this army to flight; they were dispersed and heard of no more; where are the species *belli* which Lord Hale describes? This mob wants an universality of purpose to destroy to make it so rebellious as to amount to high treason; 1 Hale's P. C. 136. There must be an universality, a purpose to destroy all houses, all inclosures, all bawdy-houses, &c. Here they fell upon two bakers and a miller, and the mob chastised these particular persons, to abate the price of provisions in a particular place. This does not amount to a rebellious mob; when the laws are executed with spirit, mobs are easily quelled; sometimes a courageous act done by a single person will quell and disperse a mob, and sometimes the wisdom of an individual will do the same, as is thus beautifully described by Virgil, "*ac veluti magno in populum sæpe coorta est seditio sævitque animus ignobile vulgus. Jamque faces et saxa volant: furor arma ministrato, cum pietate gravem ac meritis si forte virum quem conspexere silent arrectique auribus adstant ille regit dictis animos et pectora mulcet*. But amongst armies, the laws are silenced, and the wisdom or courage of an individual will signify nothing. Upon the whole I am of opinion that there must be judgment for the plaintiff. And accordingly the *postea* was ordered to be delivered to the plaintiff by three judges against one.
- [21]

9. LANGDALE V. MASON. M. T. 1780. Cited Park on Insurance, 591.
6th Edit.

So, where a fire-office introduced in the preceding exception the words civil commotion in construction of

An action was brought on a policy of insurance to recover from the Sun Fire-office a satisfaction for damage done to the plaintiff's houses and goods by the rioters, who, it is very well known, and history will inform posterity, in June, 1780, to the terror and dismay of the inhabitants of London, traversed that city for several days, burning and destroying Roman Catholic chapels, public prisons, and the houses of various individuals; the ostensible purpose of their assembling being to procure the repeal of a wise and humane law (which had passed for some indulgencies to Roman Catholics), and who were

at least only dispersed by military force. As the circumstances of these riots were which it very recent, they were not minutely gone into at the trial. It was, however, was helden sufficiently proved that the plaintiff, on account of his religion (being a Roman Catholic), had been, amongst others, selected as an object of the rage of the mob that the of the times, and that his houses and effects were set on fire. The office defended this action, considering that they were protected by the article just recited, namely, "that they would not answer for any loss occasioned by an invasion of a foreign enemy, civil commotion, or any military or usurped power whatever." This point was argued much at length by the counsel on both sides. the plaintiff's house and distillery were set on fire by the mob during the riots in 1780.

Usurped power, said Lord Mansfield, takes in rebellion, acting by usurped power amongst themselves. From a foreign enemy the office is secured; but what is a civil commotion? It is something else. The present was an insurrection of the people, resisting all law, setting the protection of the government at naught, taking away from every man who was the object of their resentment that protection, as appears from the evidence given by the witnesses upon the facts, and which you all know, as well as if no witness had been produced. What was the object and end of this insurrection? It took place at every part of the town at the same time, and the very same night, the mob were in Broad Street, St. Catharine's, in Coleman Street, at Blackfriars Bridge, and at the plaintiff's. What is the object? General destruction—general confusion. It certainly was meant to aim at the very vitals of the constitution. It was not a private matter to destroy all papists, under a pretence or cry of "no popery." The Fleet Prison was burnt down—Newgate was burnt down the night before. The King's Bench Prison is burnt, and all the prisoners set at liberty. The New Bridewell is burnt; the Bank attacked. Consider the consequences, if they had succeeded in destroying the Bank of England. The Excise and pay offices in Broad Street were threatened. Military resistance, and an extraordinary stretch was made, and justified by necessity. There was a great deal of firing; many men were killed, and the houses of a vast number of papists were hurt and destroyed. What is this but a civil commotion? No definition has been attempted to be given of what it is. It is said that this is a civil commotion, distinct from usurped power and rebellion. It is admitted, that this kind of insurance may amount to a high treason, and to be sure it may. But the office do not put their expectation upon trying whether they were guilty of high treason or not. There is no manner of doubt but this was an insurrection for a grand purpose, to take from a set of men the protection of the law; that is, levying war against the King; there is not any doubt of it. It is not put upon that, but on the ground of a civil commotion. It is not an occasional riot; that would be a question. I do not give any opinion what that might be. Gentlemen of the Jury; you will give your opinion, whether the facts in this case bring it within the idea of a civil commotion. I think a civil commotion is this; an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is an usurped power. If you think it was such an insurrection of the people for the purposes of general mischief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants; if not, you will find for the plaintiff. The jury, agreeable to the Chief Justice's directions, found for the defendants.

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II. ON LAND CARRIAGE. See *ante*, tit. Carrier.

III. ON LIVES.

1. GODSALL V. BOLDERO. M. T. 1809. K. B. 9 East, 72.

This was an action brought by Messrs. Godsalls, coachmakers, against the Directors of the Pelican Life Insurance Company on a policy on the life of the late Right Honorable William Pitt; and the declaration averred that the plaintiff's were interested in his life at the time of making the insurance, and till the time of his death to the amount of the sum insured. One of the pleas, A creditor has an insurable interest in the est in the

life of his
debtor;*

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and the material one, stated that the debt due to the plaintiffs was, after the death of Mr. Pitt and before the exhibiting of the plaintiff's bill, fully paid to the plaintiffs by the Earl of Chatham and the Lord Bishop of Lincoln, executors of the will of Mr. Pitt: issue was taken on the fact of payment by the executors. Upon the trial of this cause before Lord Ellenborough, a case was reserved for the opinion of the Court, stating, that Mr. Pitt died on the 23d of January, 1806; that the defendants were served before Trinity Term with process issued on the 3d of June, 1806; that Mr. Pitt at the time of the execution of the policy was indebted to the plaintiffs, and continued so till his death, in upwards of 5000*l.*, the sum insured, and died insolvent; that on the 6th of March, 1806, the executors of Mr. Pitt paid to the plaintiffs out of the money granted by parliament for the payment of Mr. Pitt's debts, 1109*l.*, as in full, for the debt due to them by Mr. Pitt: After argument at the bar and time taken to deliberate, the judgment of the Court was pronounced by Lord Ellenborough. This assurance, as every other to which the law gives effect; with the exceptions only contained in the 2nd and 3rd sections of the stat. 19 Geo. 2. c. 37. is in its nature a contract of indemnity, as distinguished from a contract by way of gaming or wagering. The interest which the plaintiffs had in the life of Mr. Pitt was that of creditors, and the probability of loss which resulted from his death. The event against which the indemnity was sought by this assurance was substantially the expected consequence of his death, as affecting the interest of these individuals assured in the loss of their debt. This action is, in point of law, founded on a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought; and being so founded, it follows of course, that if before the action was brought, the damage which was at first supposed likely to result to the creditors from the death of Mr. Pitt were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails; and it is no objection to this answer, that the fund out of which their debt was paid did not (as was the case in the present instance) originally belong to the executors, as the part of assets of the deceased; for, though it were derived *aliando*, the debt of the testator was equally satisfied by them thereout: and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeable to the doctrine of Lord Mansfield, in *Hamilton v. Mendes*, 2 Burr. 1210. The words of Lord Mansfield are, "The plaintiff's demand is for an indemnity: his action then must be founded upon the nature of the damnification as it really is at the time the action is brought. It is repugnant, upon a contract for an indemnity, to recover as for a total loss, when the event has decided that the damnification in truth is an average, or perhaps no loss at all. Whatever undoes the damnification in the whole or in part must operate upon the indemnity in the same degree. It is a contradiction in terms to bring an action for indemnity, where, upon the whole events, no damage has been sustained. Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law in respect of their contract, regarding it as a contract of indemnity, at the time of the action brought, we are of opinion that a verdict must be entered for the defendants on the first and third pleas, notwithstanding the finding in favour of the plaintiffs on the second plea."

* Insurance upon life is a contract by which the insurer, for a certain premium, either in a gross sum or by annual payments, proportioned to the age, health, and profession of the person whose life is the object of the insurance, engages that that person shall not die within the time limited in the policy, or if he do, that he will pay a sum of money to him in whose favour the policy was granted: but in order to prevent these insurances being converted into a mischievous kind of gaming, it is enacted by statute 14 Geo. 3. c. 48. "That no insurance shall be made on the life or lives of the person or persons, or on any other event wherein the party assured hath no interest, or by of gaming or wagering; and that in all policies the name of such interested party shall be inserted, and nothing more shall be recovered thereon than the amount of the interest of the insured."

2. DWYER v. EDIE. H. T. 1788. Cited Park on Insurance, 474. 6th Edit. [24]

An action was brought on a policy on the life of James Russell. From the 1st of June, 1784, to the 1st of June, 1785, Russell was warranted in good health; and by a memorandum at the foot of the policy it was declared that it was intended to cover the sum of 500*l.* due from Russell to the plaintiff, for which he had given his note, payable in one year, the 14th of May, 1784. Two objections were made on the part of the defendant; 1st. That part of the consideration for the note was merely won at play. 2ndly. That Russell, at the time he gave the note, was an infant. Mr. Justice Buller nonsuited the plaintiff upon the ground of part of the consideration of the note being for a gaming transaction; and, therefore, there was a want of interest in the plaintiff. But as to the other objection, on account of infancy, the interest must be contingent, for Russell might or might not avoid his note; and he doubted much whether, till so avoided, the note must not be taken against a third person to be the note of an adult; for the maker of the note only could take the objection.

Even, it seems, the debtor be an infant provided the debt be illegal, as for gaming.

3. TIDSWELL v. ANGERSTEIN. M. T. 1792. K. B. Peake. N. P. 151.

In an action on an insurance on the life of J. S. for one year, and during the life of the plaintiff; but in case the plaintiff should die before J. S. the policy to be void; it appeared that J. S. had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons, not parties to this insurance, having appointed the plaintiff executor of his will and directed him to make assurance. It having been objected, that the insurance was made by a person not having any beneficial interest, Lord Kenyon, C. J., held this to be a sufficient interest to support the action, observing, that the plaintiff could not assent to the legacy before the testator's debts were paid, without being guilty of a *derelictum*, and being executor, all the interest of the testator vested in him. The cause proceeded; but it appearing that J. S. was in a dying state when the policy was effected, the defendant had a verdict.

So a trustee though not beneficially interested, may insure.

4. GODSALL v. BOLDERO. M. T. 1807. K. B. 9 East, 72.

The plaintiff brought debt on a policy of insurance on the life of the late Mr. Pitt, effected by the plaintiffs, who were creditors of Mr. Pitt, for the sum of 500*l.* The defendants were directors of the Pelican Life Insurance Company, with whom that insurance was effected. It was agreed, that in case Mr. Pitt should happen to die at any time within one year, &c. the funds of the company should be liable to pay and make good to the plaintiffs, their executors, &c. within three months after his demise should have been duly certified to the trustees, &c. the sum of 500*l.*; and further, that the policy might be continued in force from year to year, until the expiration of the term of seven years, provided the annual premium should be duly paid on or before the 2nd of November in each year. The plaintiffs then averred, that at the time of the making of the said assurance, and from thence until the death of Mr. Pitt, they were interested in his life to the amount of the sum insured, and that they paid the annual premium of 15*l.* 15*s.* before the 28th of November, 1804, and the further sum of 15*l.* 15*s.* before the 28th of November, 1805; and that after that day and while the assurance was in force, and before the exhibiting the bill of the plaintiffs, viz. on the 23d of February, 1806, Mr. Pitt died; that his demise was afterwards duly certified to the trustees, &c.; since when, more than three months have elapsed before the commencement of this suit, &c.; but that the 500*l.* has not been paid or made good to the plaintiffs; there were also counts for so much money had and received by the defendants to the plaintiffs' use, and upon an account stated. To this the defendants pleaded, 1st. *Nil debet*. 2dly. The plaintiffs at the time of making the assurance, and from thence until the death of Mr. Pitt, were not interested in his life in manner and form as they have complained, &c. 3dly. As to the first count, that the interest of the plaintiffs in the policy, and thereby intended to be covered, was a certain debt of 500*l.* at the time of making the policy, due from Mr. Pitt to the plaintiff, and no other; and that the said debt afterwards, and after the death of Mr. Pitt, and before the exhibiting of the plaintiff's bill,

But if the creditor's debt be liquidated before the debtor's death, no claim can be made under the policy.

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to wit, on the 6th of March, 1806, was fully paid to the plaintiffs by the Earl of Chatham and the Lord Bishop of Lincoln, executors of the will of Mr. Pitt. Issues were taken on the two first pleas, and as to the last, the plaintiffs protesting that their interest in the policy thereby intended to be covered, was not the said debt mentioned in that plea to be due to them from Mr. Pitt, and no other, replied, that the said debt was not afterwards, and after the death of Mr. Pitt, and before the exhibiting of their bill, fully paid to them by the Earl of Chatham and the Lord Bishop of Lincoln, executors of Mr. Pitt, in manner and form as alleged, &c.; on which also issue was joined.

Per Cur. This assurance, as every other to which the law gives effect, with the exceptions only which are contained in the second and third sections of the stat. 19 Geo. 2. c. 27. is in its nature a contract of indemnity, as distinguished from a contract by way of gaming or wagering. The interest which the plaintiffs had in the life of Mr. Pitt was that of creditors, a description of interest which has been held in several late cases to be an insurable one, and not within the prohibition of the stat. 14 Geo. 3. c. 48. s. 1; that interest depended upon the life of Mr. Pitt, in respect of the means and of the probability of payment which the continuance of his life afforded to such creditors, and the probability of loss which resulted from his death. The event against which the indemnity was sought by this assurance was substantially the expected consequence of his death, as affecting the interests of these individuals assured in the loss of their debt. This action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought; and being so founded, it follows of course, that if before the action was brought the damage, which was at first supposed likely to result to the creditors from the death of Mr. Pitt, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such assurance, fails; and it is no objection to this answer that the fund out of which their debt was paid, did not (as was the case in the present instance) originally belong to the executors, as a part of the assets of the deceased; for though it were derived *aliunde*, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought.

5. *ROSS v. BRADSHAW.* T. T. 1780. K. B. 1 Blac. 312.

The warranty as to the health of the party insured, means that he is in a reasonably good state of health;

In an action on a policy made on the life of Sir James Ross for one year from October, 1759, to October, 1760, warranted in good health at the time of making the policy; the fact was, that Sir James had received a wound at the battle of La Feldt in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or *facies*, and which was not mentioned to the insurer. Sir James died of a malignant fever within time of the insurance; all the physicians and surgeons who were examined for the plaintiff swore that the wound had no sort of connexion with the fever, and that the want of retention was not a disorder which shortened life, but he might, notwithstanding that, have lived to the common age of man; and the surgeons who opened him, said that his intestines were all sound. There was one physician examined for the defendant, who said the want of retention was paralytic; but being asked to explain, he said it was only a local palsy, arising from the wound, but did not affect life; that on the whole he did not look upon him as a good life. Lord Mansfield. The question of fraud cannot exist in this case. When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risk, unless there was some fraud in the person insuring, either by his suppressing some circumstances which we knew, or by alleging what was false. But if the person insuring knew no more than the insurer, the latter takes the risk. In this case there is a warranty, and wherever that is the case, it must at all events be proved that the party was a good life, which makes the question on a warranty much larger than that on fraud. Here it is proved that

there was no representation at all as to the state of life, nor any question asked about it; nor was it necessary. Where an insurance is upon a representation, every material circumstance should be mentioned, such as age, life, &c. But where there is no warranty, then nothing need be told; but it must in general be proved, if litigated, that the life was in fact a good one, and so it may be though he have a particular infirmity. The only question is, whether he was in a reasonably good state of health, and such a life as ought to be insured on common terms. The jury upon this direction, without going out of court, found a verdict for the plaintiff.

6. *WILLIS v. POOLE*. E. T. 1780. Cited Park on Insurance, 584. 6th Edit.

This was an action on a policy on the life of Sir Simeon Stuart, Bart. from the 1st of April, 1779, to the 1st of April, 1780, and during the life of Eliza Edgely Ewer. His policy contained a warranty that Sir Simeon was about 57 years of age, and in good health, on the 11th of May, 1779, and that Mrs. Ewer was about 78 years of age. The defendant at the trial admitted that Sir Simeon and Mrs. Ewer were of the respective ages mentioned in the warranty; that he died before the 1st of April, 1780, and that she was living. Two questions were intended to have been made; 1st. As to the plaintiff's interest. 2nd. On the warranty of health. The former was disposed of by the plaintiff's having proved a judgment debt. As to the latter, it appeared in evidence, that although Sir Simeon was troubled with spasms and cramps from violent fits of the gout, he was in as good health, when the policy was underwritten, as he had been for a long time before. It was also proved by the broker who effected the policy that the underwriters were told that Sir Simeon was subject to the gout. Dr. Heberden and other gentlemen of the faculty were examined, who proved that spasms and convulsions were symptoms incident to the gout. Lord Mansfield. The imperfection of language is such that we have not words for every different idea; and the real intention of parties must be found out by the subject matter. By the present policy, the life is warranted, to some of the underwriters in health, to others in good health, and yet there was no difference intended in point of fact; such a warranty can never mean that a man has not the seeds of a disorder. We are all born with the seeds of mortality in us. A man subject to the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract. There was a verdict for the plaintiff.

And there fore it is no objection [27] that he is subject to violent fits of the gout, accompanied with spasms and convulsions;

7. *WATSON v. MAINWARING*. E. T. 1813. C. P. 4 Taunt. 763.

Action on a policy of insurance. For the plaintiff it was proved, by an eminent physician of Bath, to whom Dr. Watson had applied for advice, that his disorder was an affection of the bowels; that this disease may proceed from either of two causes, the one a defect of some of the internal organs, the other a mere dyspepsia: that the first would tend to shorten life; that the second, though it renders the patient uncomfortable, does not generally, unless it increases to an excessive degree, tend to shorten life; and that the complaint with which Dr. Watson was afflicted was not the organic dyspepsia. Several other medical men stated that they had attended Dr. Watson since the policy had been effected, and that he was then quite free from the disorder. It was left to the jury whether the patient's complaint was the organic dyspepsia, and if it was not, whether the dyspepsia under which he laboured was, at the time of effecting the policy, of such a degree that by its excess it tended to shorten life. The jury found that it was neither organic nor excessive, and gave a verdict for the plaintiff.

Because the term "disorder tending to shorten life," is con sidered to dis ease which usually have that tenden cy.

Per Cur. All disorders have more or less a tendency to shorten life, even the most trifling; as for instance, corns may end in a mortification, that is not the meaning of the clause: if dyspepsia were a disorder that tended to shorten life within this exception, the lives of half the members of the profession of the law would be uninsurable.

8. *AVISON v. KINNAIRD*. H. T. 1805. K. B. 6 East, 188; S. C. 2 Smith, 237. [28]

This was an action upon a policy of insurance, by the defendants, the directors of the Westminster Insurance Company, on the life of Sarah, the wife of ty was in a

bad state of the plaintiff, which was tried before Graham, B., at the last summer assizes for Lancaster. The policy of insurance was dated the 22d of November, 1802, with a warrant that the said S. A. was in good health, and not exceeding the age of 22 years. Application was made by Avison to the agent of the insurance office at Manchester, on the 9th of November, 1802, who after having called in a surgeon at Manchester to examine Mrs. Avison, wrote up to London to effect the insurance. This surgeon, upon being called in as a witness at the trial, stated that he never was more satisfied in his life; the pulse of Mrs. A. was good; and he never knew any person affected with liquor but it was discoverable upon her pulse. Other witnesses were called on the part of the plaintiff, to prove the good state of health of Mrs. A. at the time of the insurance; and on the part of the defendant some were called to prove that she had acquired a habit of drinking, which at that time had impaired her constitution; and she died in about six months afterwards, in May, 1803. An apothecary was also called who attended her on the 22d of November. He was called to attend her on the 15th, and he said that he found that the stomach was somewhat affected: that she took too copiously of spirits; he considered her, however, as a healthy woman, and he would not administer much medicine, and she recovered by one of those effects of nature which result from a young and good constitution; but he thought her illness of so much importance that if she continued the habit of drinking, it would endanger her life. It appeared that she might have taken probably about a bottle of brandy a day. Susanah Lee said, that she saw Mrs. Avison about a day or two after she had been to Manchester, which was nine miles from her home; she called on her, not knowing that she was ill; she found her in bed at eleven o'clock in the forenoon; she spoke very faintly, and said she was very poorly; that she had been to Manchester to get her life insured; that she was poorly when she went; that the policy would not come back from London in less than ten days; and that she was afraid she should not live till it came back, and if that were the case, her husband would not get the money. The counsel for the plaintiff objected to this evidence, in the early part of it, as to the declarations of the wife, which they said should not be received for or against her husband; but the learned judge held that as the evidence of the apothecary and of Thorpe the surgeon, who examined her at Manchester, were founded, in a great measure, on her representations of the state of her health, and as the general opinion of a surgeon concerning the state of the health of any person must partly be formed upon the evidence of the person himself, the evidence was admissible. He then directed the jury to consider whether this habit of excessive drinking was formed at the time of the insurance, and whether any mischief was done by it to the constitution of Mrs. A., so that unless she abandoned it she should not be in good health. The jury found a verdict for the defendants.

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Per Cur. This case appears to have been argued, by the counsel for the plaintiff, upon principles of much greater latitude and importance than the scope and extent of the question really before the Court, and the principles arising out of it, justify warrant. It is not now a question whether the mutual confidence between a husband and wife should be broken, and whether by the disclosure of the testimony now disputed, the means should be afforded of wresting from the bosom of the wife those secrets which were deposited there by the husband in the unrestrained communications of family intercourse. It is, on the contrary, now only required that a sick person should be heard to state that which at all times patients have been admitted to state, namely, the cause the rise, and the progress of their malady, and the period at which to fix the commencement of those symptoms which mark the nature of the disorder with which they are afflicted. To this extent only, and no further, is the evidence in this case applied. A woman is here found in a state of bodily infirmity, and she declares that this bodily infirmity had existed some days before, when she went to Manchester; she assigns that time as a date to which to attribute the access of her malady, and is not required to give evidence of the fact of her going to Manchester, for that was already proved. Whenever any evidence

is given of the state of a patient's health by a medical man, and whenever a physician visits a patient, questions must be put and answered: How do you feel yourself? When did your symptoms of indisposition first commence? or, How long have you been ill? For it is impossible to judge of health merely from the face, the complexion, or the pulse. What then does the woman say, and what is the substance of her representations to Mrs. Lee? Why, no more than this, that she was ill at the time she was in bed: that her being ill was the reason of her lying in bed so late; and that her then present illness had lasted from the time when she went to Manchester. But on another ground, this evidence is admissible; for if the surgeon founds his knowledge of the state of the party's health principally upon her own representation, which he must do, then this is only the cross-examination of the same witness, the wife and patient herself, as to the state of her health, concerning which she has given different statements at different times. It may be said, however, that the uncertain declarations of third parties are never received in evidence, they not being upon oath; but that objection is not material, for there are some exceptions, and we remember a notable case of such exception. A person was attesting witness to a bond: after his death it was necessary to prove his handwriting as attesting witness; proof was, therefore, given of his death, and on the other side, evidence was received of a communication made in his dying moments upon this principle, that if we had put the deed into his hands at the trial, I might have asked him the questions to which these communications would have applied. But however, independently of such authority, if this woman's declarations to the surgeon, given at a contemporary period nearly, are received, her declarations given to Mrs. Lee show that at least she was not to be wholly believed. And therefore, as this does not break in upon the principle of keeping inviolate the confidence of private life, for the preservation of matrimonial comfort, we think that this statement by her, nearly contemporary to her examination by the surgeon, of a fact which must be known to her particularly and personally, must be admissible.

9. *STACKPOLE v. SIMON*. H. T. 1772. Cited Park on Insurance, 582.

This was an action on a policy of insurance for 150*l.* at four guineas per cent. in case Drury Sheppey should die at any time between the 1st of April, 1777, and the 1st of April, 1778, both days included, and during the life-time of John Sheppey, the father of Drury; but in case the said John should die before the said Drury, the policy to be void: the question was, as to the representation of the life at the time of the insurance. The interest in the insurance was 900*l.* due from Drury Sheppey to the plaintiff. It was admitted that the life expired within the time limited in the policy. Drury Sheppey had a place in the Custom-house of Ireland, and was in bad circumstances; he went to the south of France for the benefit of his health, or to avoid his creditors, and there died. The broker who effected the policy told the underwriters that the gentleman for whom he acted would not warrant, but from the account he, the broker, had received, he believed it to be a good life.

Lord Mansfield. As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. Where there is no warranty the underwriter runs the risk of its being a good life or not. If there be a concealment of the knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to the representation made to the first; and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own, but speaks from information. There is no fraud in this. There was a verdict for the plaintiff. Even where there is an express warranty that the person is in good health, it is sufficient that he is in a reasonable good state of health; for it never can mean that the *cestui que vie* is perfectly free from the seeds of disorder; nay, even if the person whose life was insured laboured under a particular infirmity, if it can be proved by medical men that it did not at all, in their judgment, contribute to his death, the warranty of health has been fully complied with, and the insurer is liable.

[30]
And if fraud
or misrepre-
sentation
appears, the
policy will
be vitiated.

However, where the assured was described to the assurers as resident at Fisherton Anger. She was then a prisoner in the county gaol there. On a rule nisi to set aside the nonsuit and have a new trial the Court observed that they had examined the documents, and there was nothing that she was in gaol there, it was holden to be a question for the jury, whether or the im-

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prisonment was a fact material to be disclosed to the assurers.

The payment of the premium must be according to the terms used, and the apparent intent of the parties, and are not satisfied by a performance *pro*.

10. HUGGONIN v. RAYLEY. E. T. 1815. C. P. 6 Taunt. 186.

The conditions of a life insurance required a declaration of the state of the health of the assured, and the policy was to be valid only if the statement were free from all misrepresentation and reservation. The declaration described the assured as resident at Fisherton Anger. She was then a prisoner in the county gaol there. On a rule nisi to set aside the nonsuit and have a new trial the Court observed that they had examined the documents, and there was nothing that she was in gaol there, it was holden to be a question for the jury, whether or the im-

11. WANT v. BLUNT. H. T. 1810. K. B. 12 East, 183.

On the 6th of June, 1796, the defendants, being three of the committee of the Life Assurance Society, for the benefit of widows and female relations, executed a policy, reciting that William Wyatt Want, of Windsor, had become a member of the society, according to the deed of settlement of the 19th of December, 1795, inrolled in the Court of King's Bench, and had proposed to make assurance with the said society, for an annuity of 50*l.* to be paid to Elizabeth, his wife, for her life, in case she should survive him, and had delivered in a declaration setting forth their respective ages, and his state of health, and reciting that the society had consented to assure such annuity, in consideration of a quarterly premium of 2*l.* 13*s.* 6*d.* to be paid to the society during the life of the said W. W. Want; the policy then recited that W. W. Want had executed the said deed of settlement, and had paid the premium for one quarter of a year, from the date of the policy; thereupon, the defendants, whose names were subscribed to the policy, and their seal affixed, being three of the committee for managing the affairs of the society, did, for, and on behalf of the said society, covenant, promise, and agree to, and with the said W. W. Want, his executors and administrators, and if he shall well and truly pay, or cause to be paid to the clerk and the receiver of the society for the time being, the full sum of 2*l.* 13*s.* 6*d.* on every 25th of March, 24th of June, 29th of September, and 20th of December, during the life of the said W. W. Want, or within such time after those days respectively, as is or shall be allowed for that purpose by the rules of the said society; and if he shall also pay and contribute his proportion of the monies which the members of the society shall, during his life, be called upon to pay and contribute according to the rules, towards making good any deficiency of the funds of the society, to answer the claims upon it, and shall in all other respects observe the rules and bye-laws of the society; then on due proof being made of the death of the said W. W. Want, the committee of the society for the time being, shall and will well and truly pay, out of the stock and funds of the society, unto the said Elizabeth, or her assigns, after his death, in case she shall survive him, one clear annuity of 50*l.* during her life, by equal payments, on the 25th of March, 24th of June, 29th of September, and the 20th of December, in every year, the first payment to be made on such of those days as should first and next happen after the decease of the said W. W. Want.—Added to the policy was a N. B., that by the rules of the society, if any member neglect to pay the quarterly premium for fifteen days after the same become due, the policy will be void, unless the member continuing in as good health as when the policy expired, pay up within six calendar months then next all arrears, together with 5*s.* for every month elapsed after such premium became due, or 5*s.* for the time elapsed, if less than a month. There was another policy of the same tenor and date for another like annuity of 50*l.* By the rules of the society, it was amongst other things declared and agreed, that if any member of that society should neglect to pay any quarterly premium which should be payable for any assurance, for the space of fifteen days after the same should become due, then the policy should cease and determine,

and the assurance be void to all intents and purposes, unless the member making such default should, within six calendar months next ensuing, continuing in as good health as at the time the policy was suffered to expire, pay up all arrears of such premiums, together with 5s. for every month which should have elapsed. The case then states, that continually from the time of making the two policies, the quarterly premiums therein mentioned, which respectively became due before, and on the 29th of September, 1808, were duly paid within the time allowed for that purpose; but that the quarterly payments which became due on the 20th of December, 1808, were not paid at the time they became due; that W. W. Want died on the 25th of December, 1808; that he did not in his life-time pay, or tender, or offer to pay the said quarterly premiums, which became due on the 20th of December, 1808, or either of them, but that on the 27th of December, 1808, which was after his death, but within fifteen days after the said 20th of December, when they had become due, the said two quarterly premiums were tendered and offered to be paid by the executors of the said W. W. Want, to the clerk and receiver of the said society, to whom also due proof of his death was offered, who refused to receive them. This is a contract of assurance, and must be construed according to the meaning of the parties expressed in the deed of policy. It is an insurance on the life of the husband, not as usually is the case, of a certain sum of money payable on the event of his death, during the continuance of the policy or insurance, but of an annual payment of his wife for her life, in case she shall survive him, to commence from and after his decease; the risk insured against is his death, and the premium is a quarterly payment, to be made by him to the society, who are the underwriters, during his life. The duration of the insurance is so long as he shall continue to make those quarterly payments; but the insurance is not to be void if he pay the quarterly premium within such time after the quarter day as is allowed by the rules of the society. The rules of the society, as stated in the case, are, that if any member should neglect to pay any quarterly premium for the space of fifteen days after the same should become due, then the policy and assurance thereby made should absolutely cease, and be void to all intents and purposes, unless the member making such default, should, within six calendar months next, continuing in as good health as when his policy was suffered to expire, pay up all arrears of such quarterly premiums, and also 5s. for every month, and fraction of a month, which should have elapsed since such premium became due. This is the only rule of the society allowing any further time beyond the quarter day, and by this rule it seems to be allowed to the assured or member to keep his assurance on foot, and his policy in force, on the terms of simply paying up the quarterly premium, if the neglect has not exceeded fifteen days after the same became due, without any additional penalty, and without the condition, which is imposed in case of longer neglect, of being in as good state of health as when his policy expired. But the plaintiff contends, and her whole case depends on making out that point, that by the true construction of this rule of the society, and the clause in the policy referring to it, it is not necessary that the party whose life is insured should himself pay, or cause to be paid, the premium within fifteen days, or, in fact, be alive at the time it is paid; but that it is sufficient if any other person interested in the insurance should cause it to be paid within fifteen days, though the event insured against might then have happened. In order to determine this point, it is material to consider, 1st. Whether at the time of the death of the person insured, the policy were or were not expired; because if the policy were expired at the time, the defendants cannot be liable. Now the insurance is for a quarter of a year, and so on, from quarter to quarter, and it expires at the quarter day; such is the clear understanding of the parties, as expressed in the rule of the society, referred to by the policy, and stated in the case, viz. continuing in as good health as when his policy was suffered to expire; that must refer to the quarter day, up to which only the premium had been paid, and cannot include the further term of fifteen days, which must be covered by

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the further premium; each premium being for an assurance for a quarter of a year only, and not for a quarter and fifteen days; for these reasons, we are of opinion, that the death of W. W. Want, which happened on the 25th of December, was during a period of time not covered by the policy, and that on the true construction of the policy and rules of the society, the insurance could not be continued beyond the expiration of the quarter, which ended on the 20th of December, by a tender of the premium by his executors, after his death, though within fifteen days after the quarter day, so as to include within the policy the period of his death: The consequence is, that judgment of nonsuit must be entered.

If a man whose life has been insured up to a certain day, die after the day of a wound received pending the insurance, the insurer is not liable.

12. *LOCKYER V. OFFLEY*. E. T. 1786. K. B. 1 T. R. 260.

Per Willes, J. I will put a case; suppose an insurance on a man's life for a year, and some short time before the expiration of the term, he receives a mortal wound, of which he dies after the year; the insurer would not be liable.

IV. MARINE.*

(A) RELATIVE TO WHAT PERSONS MAY INSURE.

1. *RAPHAEL V. NESBIT*. M. T. 1794. K. B. 6 T. R. 23.

Aliens can not insure;†

Plea of alienage to an action on a policy of insurance, brought in the name of an English agent, for his principal, and alien; and such interest appearing on the record, Lord Kenyon, C. J. said, that the Court had considered this case, and unless any thing more could be urged at the bar to shake the opinion they had formed, they were of opinion that judgment must be given for the defendants, on this ground, that an action will not lie either by or in favour of an alien enemy.

2. *GAMBA V. LE MESURIER*. M. T. 1803. K. B. 4 East, 408.

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And if they do, it can not be enforced during the war or after its termination;

This was an action upon a policy effected by French subjects, before the war which broke out in 1793, upon the ship *Æole* and her cargo, which were captured afterwards during the war. The action was brought during the period in which amity was restored between the two countries.

Per Cur. This action, for the reasons already given in case of *Kellnor v. Le Mesurier*, we are of opinion is not maintainable. It was said in the course of the argument in this case, on the part of the plaintiff, that the point was made by Mr. Warren on the construction and effect of the statutes 34 Geo. 3. c. 9. s. 79. as recognizing the right to maintain this species of action, upon which we have observed already. The other grounds upon which he principally rested his arguments for the defendants have not induced us to alter the opinion we formed on the hearing of the former case; for it by no means follows that an action can be maintained on a contract detrimental to the interests of the state, because until a particular statute was made to prohibit ransom bills actions were in fact maintained on such bills, for, as was observed at the bar at the time when such contracts were allowed to be sued upon, it was supposed that the interests of the country were rather advanced than prejudiced by them. And as to the argument built upon the supposed case of a contract made before a war, to supply an alien with a certain number of ships, or certain quantities of goods after a war, it does not appear to us to have any bearing on the question, for such contract would not have any tendency to assist the enemy by indemnifying him against the reprisals of this country, unless the supply of ships or goods were to depend on the losses which he might happen to sustain during the war, in which case the same objection would hold as that which prevents an insurance during the war; for it differs only in degree, whether an enemy be indemnified during a war, for the losses he sustains in consequence of it, or whether he receives a compensation for those same losses after the determination of the war; in both cases the loss will one time or

* The instrument by which the contract of indemnity is effected between the insurer and the insured is denominated a policy.

Policies are of two distinct kinds, valued and open; in the former, the value of the property insured has been settled between the parties, and expressly inserted in the instrument; in the latter, the value of the thing insured is not inserted, but must be ascertained and proved at the trial.

† In general all other persons may insure; see 2 Selw. N. P. 912, 5th Edit.

another fall on the country of which the insurer is a subject, and the enemy will, during the war, receive either means or encouragement from his losses, being in the one case compensated as they shall happen, and in the other from his prospect of indemnity at last.

3. *BRANDON V. NISBETT*. M. T. 1794. K. B. 6 T. R. 23.

The replication to the first plea stated, that the persons interested in the insurance were, before the commencement of the war, and at the commencement of the suit, severally and respectively indebted to the plaintiff in divers sums of money, exceeding the respective interests of those persons in the goods insured, specifying what sum was due to the plaintiff from each of those persons respectively. The replication to the second plea, stated that the exportation of goods insured, which consisted of muslins, pieces of calico, &c. was not prohibited by any law at the time of the policy, and that they were put on board the ship before the commencement of the war, for the purpose of being carried on the said voyage, &c.

Lord Kenyon, C. J. said, that the Court had considered this case; and unless any thing more could be urged at the bar to shake the opinion they had formed, they were of opinion that judgment must be given for the defendant on this ground, that an action will not lie either by or in favour of an alien enemy. [35]

4. *OOM V. BRUCE*. E. T. 1810. K. B. 12 East, 225.

The insurance was made by the plaintiffs, as agents of John Plateonoff, a Russian subject abroad, in whom the interest was averred to be at the time of the insurance and of the loss. The ship, which was nineteen days in loading, was ready and sailed from the Russian port on the 17th of October, 1807, but was brought back on the same day, confiscated in Russia, hostilities having been commenced by that government against Great Britain on the day before, but which event was of course unknown at the time when the insurance was effected by the plaintiffs in London.

Lord Ellenborough, C. J., considered that the plaintiffs, having effected the insurance, without any consciousness of its illegality at the time, were entitled to recover back the premium, as money had and received by the defendants to their use without consideration; and they obtained a verdict for the amount. To entitle the underwriter to retain the premium, he should have shown that the policy would have attached on any loss happening to the cargo on board the lighters in their way to the ship before the commencement of hostilities, though the contract was not made till after hostilities commenced; but the period to look to as to the legality of the contract is the time when it was made; and then the subjects of Russia had become enemies of this country, and it was no longer competent for the subjects of this country to enter into such contract. But no such blame attaches to the plaintiffs, who were ignorant of the fact at the time; and therefore they are entitled to a return of premium.

5. *BRANDON V. CURLING*. M. T. 1803. K. B. 4 East, 410.

This was the case of a policy of assurance on goods purchased on account of certain Frenchmen, and shipped for their benefit on board the Greyhound, an American ship, before, and actually exported after, the declaration of hostilities between the countries of Great Britain and France, in February, 1793; and the question was, whether a policy of assurance on goods effected on usual terms by the plaintiff, a British subject under orders from the French subjects, who are averred to be interested therein, and underwritten by the defendant, a British subject, be an insurance valid and effectual in point of law, for the purpose of covering such goods, in the course of their exportation and transit from Great Britain to Bayonne, in France, in the event, which has taken place, of a war between the two countries.

Per Cur. Having in the judgments recently given by us, in the cases of *Kellner v. Le Mesurier*, and *Ganda v. Le Mesurier*, declared our opinion, that the general terms of insurance against capture are to be understood as

* It is, indeed, extremely questionable, whether any country, on the breaking out of a war, has a right to confiscate debts from its subjects to the hostile nation; for the general rule appears to be, that *incorporatio bello non acquiritur*; and although it has been laid

Which arises after effecting the insurance, and subsequent to the commencement of the risk; and it makes no difference that the action is brought on the policy after the cessation of the war.

- [36] virtually containing an exception of such captures as might eventually be made by his Majesty and his subjects, and against which a British subject could not, consistently with his public duty, insure in direct terms, it follows as a consequence of the same principle, that wherever the generality of the terms of assurance might in their actual application to the covering of any particular risk produce, if effect were given to them in their extended sense, a similar contravention of public interest, the insurance must be considered in such a manner as to exclude the particular event or peril, which could not, for the reason above-mentioned, be so made the subject of a legal insurance, in direct terms by a British underwriter; so that where the insurance is upon goods generally, a proviso to this effect shall in all cases be considered as engrained therein, viz. provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer; because, during the existence of such hostilities, the subjects of one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other. And in like manner, and upon similar principles of public policy, the risk of detention of princes, &c.; must be understood to be restrained and qualified by an implied proviso that it shall not extend to cover any loss happening in the course of any contraband adventure, in which the goods would become liable to seizure as forfeited by the laws of the country. More instances might be put of similar implied exceptions which may arise out of the general terms of this contract, but these are sufficient for the present purpose. Inasmuch, therefore, as the loss now in question comes within the immediate scope and terms of that provision which we consider as necessarily to be implied in respect to the eventual existence of hostilities between the respective countries of the assured and the assurer, we are upon this ground of opinion that the plaintiff is not entitled to recover.
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6. FLINDT v. WATERS. E. T. 1812. K. B. 15 East, 260.

But the objection that the alien principal, on whose behalf a British agent is suing in *asumpsit* in his own name, has become an enemy since the contract was made, cannot be taken under the general issue;

The British agent effected a policy of insurance on behalf of alien enemies, who became enemies after the loss happened, but before the action commenced, to which the underwriter had only pleaded the general issue. A verdict having been obtained for the plaintiff under his lordship's direction, who thought that, as the plaintiff on the record was not an alien enemy, no advantage could be taken of the objection without a plea of alien enemy; it was moved for a new trial, on the ground that the persons interested in five-sixths of the cargo being alien enemies at the time the action commenced, no recovery could be had by the plaintiff's agent on their behalf; and cited *Brandon v. Nesbitt*, 6 Term. Rep. 23; where this question was so decided, upon a plea of alien enemy; and *Bristow v. Towers*, 6 Term. Rep. 35; where the

down by high authority, *Hale*, P. C. vol. i. p. 95. that "by the law of England, debts and goods found in this realm belonging to alien enemies belong to the King, and may be seized by him," yet the books to which reference has been made do not furnish an instance of the seizure of debts, or a decided case in support of the legality of such a seizure. By *Magna Charta* merchant-strangers are, upon the breaking out of a war, to be attached, and kept without harm to body or goods, until it shall be known how the English merchants are treated by the sovereign of their state; and if the latter are safe there, the former are to be safe here, *stat. Mag. Char. c. 30*; so that foreign merchants could suffer nothing in England, unless by way of retaliation and reprisal. An ordinance of a state decreeing a seizure of debts due from its subjects to alien enemies appears to be illegal and void, as contrary to the law of nations. Therefore, where an ordinance was made by the government of Denmark, pending hostilities with Great Britain, whereby all ships, goods, money, or money's worth, of or belonging to English subjects, were declared to be sequestrated and detained; and all persons were commanded, within three days, to transmit an account of debts due to English subjects, in default of which they were to be proceeded against in the Exchequer; in consequence of which, a suit then depending in the Danish court for recovering a debt due from a Danish to a British subject was not further prosecuted, and the debt was afterwards paid by the Danish subject at the rate specified by the ordinance, to commissioners appointed in virtue of the ordinance to receive payment, upon production of whose receipt the Danish court quashed the suit; this was held to be no answer to an action against the Danish subject to recover the same debt in the courts of this country; for the ordinance not being conformable to the law of nations, was held to be void; *Walsh and others v. Oxholm*, 6 M. & S. 92.

evidence of hostile alienage was received upon the general issue, on which a special verdict was afterwards found.

Per Cur. The ground of our decision in this case will not at all clash with the doctrine laid down by the Court in *Brandon v. Nesbitt*. The point there decided was, that the fact of the parties interested in the insurance having become alien enemies before the loss happened, might be pleaded to an action brought in the name of the British agent who effected the insurance; and the Court are disposed to confirm that doctrine. But the defence of alien enemy must be accommodated to the nature of the transaction out of which it arises; it may go to the contract itself on which the plaintiff sues, and operate as a perpetual lien; or the objection may, as in a case of this sort, be merely personal, in respect to the capacity of the party to sue upon it. Here the objection is taken upon the general issue, which is a plea of a perpetual lien, and if found against the plaintiff, would have concluded him for ever; so that, though peace should be established to-morrow between the two countries, and the Crown should not have interfered to seize the debt; yet on this in bar the plaintiff would have been for ever estopped to sue for his debt. But here the objection is only of a temporary nature: the contract itself was perfect at the time it was made; the trade was with an alien friend, which required no licence, though one was obtained *ex abundanti cautela*. The insurance, the loss, and cause of action, had arisen before the assured had become alien enemies; when, therefore, they became such, it was only a temporary suspension of their own right of suit in the courts here, as alien enemies; but that objection cannot be carried further, nor applied to the plaintiff as their trustee, who, is a subject of the King; otherwise, if it could avail upon this plea, it would be making that a perpetual, which, in its nature, is only a temporary bar.

7. *HARMAN v. KINGSTON*. M. T. 1811. N. P. 3 Campb. 153. [38]

In an action on a policy of insurance, the plaintiff's case being made out, the defence set up was, that the persons interested, six in number, are now resident at Bremen, which is annexed to France, and are therefore alien enemies, so as to be incapable of taking advantage of a licence to them when they stood to this country in the relation of neutrality. It was proved that they were all living at Bremen in the latter end of the year 1810, and the Attorney-General contended, that till the contrary was shown, it must be presumed they had lived there ever since.

Lord Ellenborough. I think this is no defence upon the general issue. The fact of the persons interested having become alien enemies since the loss, only goes to suspend the remedy, and ought to have been pleaded in abatement; besides, you have given no evidence where these persons were born, nor proved that they were living in a hostile territory at the time of action brought; you have not shown them to be enemies either by birth or by domicile. How do I certainly know that they were not all British subjects, who left Bremen as soon as they could after that place was usurped by the French, and are now carrying on trade within the realm of England? A defence of this sort, which goes merely in disability of the person, is to be made out by the strictest proof.

8. *HAGEDORN v. BAZETT*. M. T. 1813. K. B. 2 M. & S. 100.

An insurance was effected on a cargo of goods, the interest of which was vested in a British subject, and in certain Hamburgers and Russians, in various proportions, and a licence had been obtained to protect the adventure on behalf of all the owners of the cargo, which was considered incapable of protecting the subjects of Russia, a nation then at war with this country; it was held that the plaintiff, who had effected the insurance on behalf of all the parties interested, and who was himself entitled to a part of the cargo, might nevertheless recover in respect of his own interest, and also of that of the Hamburgers, who were then in a state of permissive neutrality; 2 M. & S. 100; *Keir v. Dudnade*, 6 Taunt. 498; 2 Marsh. Rep. 196; *Pieschell v. Allnut*, 4 Taunt. 792; *Butter v. Allnut*, 1 Stark. 222; *Pastin v. Dick*, 11 East, 582; 2 Camp. 221; 2 M. & S. 105, 106; Rol. Rep. 131; *Roberts v. Handy*, 3 M. & S. 533.

Lord Ellenborough, C. J., in delivering the judgment of the Court, observed, that the mere accidental circumstance of several persons having employed one common agent, did not communicate to the others the vice belonging to the property of one of the insured; that in this case there was no common or joint interest in the whole of the property insured, subsisting in the different individuals, nor was there any fraud. Had there been (he said) a partnership amongst all the parties in the entire cargo, or even if any consent had been given to the employment of one common agent, the objection might have had a different effect.

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As where in a cargo the alien is entitled to a ninth and a British subject to the remainder, the latter is entitled to recover the amount of his shares.

9. *FEIZE V. AGUILAR*. E. T. 1811. C. P. 3 Taunt. 506.

This was an action upon a policy of insurance upon goods valued at 19,000*l*. Several persons had contributed to form this cargo, respectively becoming partners with the plaintiffs in various assortments of goods which those persons chose. The plaintiffs were interested in the proportion of four parts in nine of the whole, and the other persons, some of whom were alien enemies, were interested in the other five parts; the plaintiffs had written instructions to their broker to insure four parts in nine for the account of the plaintiffs and others; but there was no evidence that any others than the plaintiffs had acquired any interest in those four parts. The plaintiffs obtained a verdict upon a count in which they had laid the interest in themselves.

Per Cur. Suppose other persons besides the plaintiffs were interested; yet if the plaintiffs were interested, is not that sufficient in the case of a valued policy? It has been held again and again, that it is unnecessary to prove the amount of interest under a valued policy. Therefore we must take it that the value insured is the value of the plaintiffs' interest. This objection certainly was not started at the trial; no doubt it appeared that others were interested in the other five parts, but Feize and Jannins had a several interest in four parts; the purport of the instructions to the broker were, to insure, as to those four parts, for their account, and the account of others who may interest themselves, i. e. in those four parts. It was competent for the plaintiffs to insure their separate interest, as it was competent in others to choose whether they would insure theirs or not. The defendant ought to have shown that others did acquire an interest in those four parts, before he could raise this objection.

10. *BARKER V. BLAKES*. H. T. 1808. K. B. 9 East, 283.

The subjects of a neutral state may insure.

Per Cur. It is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of a hostile description, not otherwise expressly or impliedly forbidden by the law or policy of this country, though the neutral thereby subject his ship to be detained and carried into a British port for the purpose of search; and therefore a British underwriter, after condemnation of the enemy's goods found on board, and liberation of the ship and the rest of the cargo, is liable to the neutral owner of goods insured in the same ship whose voyage was so interrupted; either as for a total loss, if notice of abandonment upon the loss of the voyage be given in reasonable time; or for an average loss, if such notice be given out of time.

11. *HULLMAN V. WHITMORE*. M. T. 1814. K. B. 3 M. & S. 338.

So an insurance may be effected upon the interest of an

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alien enemy, under the protection of a licence from the Crown.

The first count averred that the policy was effected by the plaintiffs as the agents and by the orders of Cornelius Nalet, and that the interest was in him; the second, that the interest was in the plaintiff's loss by capture. At the trial before Lord Ellenborough, C. J., the following facts were disclosed: that Nalet, who was the owner of the *Venus*, was a Dutch merchant, resident in Holland; the plaintiffs were British merchants, resident in London, and by Nalet's directions purchased and shipped, on his account, on board the *Venus*, a quantity of coffee and logwood, with which she sailed on the 15th of February 1809, for Ziboree, in Holland, under a licence. This licence was obtained in pursuance of an order in council, by one W. Vink, the broker of the plaintiffs, who was employed by them to procure it; and it recited that it had been represented to the privy council by W. Vink, on behalf of different British merchants, that they were desirous of obtaining a licence for permitting the *Ve-*

ness, Jan Pieters, master, to proceed under any colours except the French, with a cargo of such goods as were permitted by virtue of an order in council of the 11th November, 1807, to be exported from London to any port between the Texel and Scheldt inclusive, with permission to include a quantity of foreign and prize colonial produce and coffee; and the licence was granted for the purposes set forth in the order of council, and directed the commander of all ships of war to suffer her to proceed as aforesaid, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other hostile or neutral port. The ship and cargo were captured on the voyage off the coast of Holland, and there was afterwards a recapture of the ship and part of the cargo. A verdict was found for the plaintiff. A rule nisi for setting it aside having been obtained in the last term, upon the ground that the licence was insufficient to cover the property of Nolet, an alien enemy; *Per Cur.* This is an insurance upon goods on board the *Venus*, upon a voyage from London to any ports in Holland or Zealand. The ship sailed under a licence granted upon a representation made by the agent of the plaintiffs, on behalf of different British merchants, for permitting the ship to proceed under any colours, except the French, with a specified cargo, from London to any port between the Texel and Scheldt. The ship and goods were captured on that voyage. And the question arises on the count which avers the goods to be the property of Nolet, an alien enemy. The question comes to this, whether or not the government of this country, in granting this licence, meant to protect that which has been done in this case? It is to be observed, that this is not a licence to any particular persons to export their goods; it states a petition by Vink, on behalf of different British merchants; but the prayer is for permitting a particular ship to proceed under any colours, except the French, with a cargo of goods to be exported from London to any port between the Texel and Scheldt; and the grant is to that effect, and authorizes the vessel to proceed on such voyage. On behalf of the defendant it must be shown to the Court that this licence ought to be limited to British merchants only to export goods which were the property of such British merchants at the time of exportation; but it does not seem to us that this licence ought so to be limited. The licence is silent as to the property of the cargo, to whom it ought to belong; that being so, it may be fairly asked, when we consider the object of this licence, what difference it can make whether the cargo is the property of an alien enemy at the time of its exportation from the ports of this country, or whether it becomes so upon its arrival at the port of destination in the foreign country. If there be no real difference as it affects the purposes of the licence, then the case of *Robinson v. Jouray* does not differ in principle from this; that was a licence on the petition of a British merchant to import into this country a cargo from a foreign country in hostility with this, and the cargo was the property of an alien enemy, a subject of that country; nevertheless it was considered that the licence protected the importation of it into this country, not being confined to the British merchant; and if that licence was held good to protect such a cargo, so ought this, which authorizes the exporting a cargo to a hostile country; so far it appears to us that the principle of that is an authority upon the present question.

12. *KENNINGTON v. INGLIS*. H. T. 1807. K. B. 8 East, 273.

Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured, between the first of October, 1790, and the 1st of June, 1800, a memorandum written on the policy on the 11th of June, extending the time of sailing to the 1st of August, 1800, the question was whether it does require a new stamp, being within the 13th section of the stat. 35 Geo. 3. c. 63. which provides that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the terms or conditions of any policy, &c.

Per Cur. Objection arose on the unstamped memorandum of the 11th of June, 1800, which was said not to fall within the proviso contained in the 13th section of statute 35 Geo. 3. c. 63. And this objection was shaped two

Such a licence legalizing a particular adventure, incidentally authorizes all the measures necessary to be adopted for its due and effectual prosecution;

Lord Ellenborough, C. J., in delivering the judgment of the Court, observed, that the mere accidental circumstance of several persons having employed one common agent, did not communicate to the others the vice belonging to the property of one of the insured; that in this case there was no common or joint interest in the whole of the property insured, subsisting in the different individuals, nor was there any fraud. Had there been (he said) a partnership amongst all the parties in the entire cargo, or even if any consent had been given to the employment of one common agent, the objection might have had a different effect.

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As where in a cargo the alien is entitled to a ninth and a British subject to the remainder, the latter is entitled to recover the amount of his shares.

9. FEIZE V. AGUILAR. E. T. 1811. C. P. 3 Taunt. 606.

This was an action upon a policy of insurance upon goods valued at 19,000*l*. Several persons had contributed to form this cargo, respectively becoming partners with the plaintiffs in various assortments of goods which those persons chose. The plaintiffs were interested in the proportion of four parts in nine of the whole, and the other persons, some of whom were alien enemies, were interested in the other five parts; the plaintiffs had written instructions to their broker to insure four parts in nine for the account of the plaintiffs and others; but there was no evidence that any others than the plaintiffs had acquired any interest in those four parts. The plaintiffs obtained a verdict upon a count in which they had laid the interest in themselves.

Per Cur. Suppose other persons besides the plaintiffs were interested; yet if the plaintiffs were interested, is not that sufficient in the case of a valued policy? It has been held again and again, that it is unnecessary to prove the amount of interest under a valued policy. Therefore we must take it that the value insured is the value of the plaintiffs' interest. This objection certainly was not started at the trial; no doubt it appeared that others were interested in the other five parts, but Feize and Jannins had a several interest in four parts; the purport of the instructions to the broker were, to insure, as to those four parts, for their account, and the account of others who may interest themselves, i. e. in those four parts. It was competent for the plaintiffs to insure their separate interest, as it was competent in others to choose whether they would insure theirs or not. The defendant ought to have shown that others did acquire an interest in those four parts, before he could raise this objection.

10. BARKER V. BLAKES. H. T. 1808. K. B. 9 East, 283.

Per Cur. It is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of a hostile description, not otherwise expressly or impliedly forbidden by the law or policy of this country, though the neutral thereby subject his ship to be detained and carried into a British port for the purpose of search; and therefore a British underwriter, after condemnation of the enemy's goods found on board, and liberation of the ship and the rest of the cargo, is liable to the neutral owner of goods insured in the same ship whose voyage was so interrupted; either as for a total loss, if notice of abandonment upon the loss of the voyage be given in reasonable time; or for an average loss, if such notice be given out of time.

11. HULLMAN V. WHITMORE. M. T. 1814. K. B. 3 M. & S. 338.

The first count averred that the policy was effected by the plaintiffs as the agents and by the orders of Cornelius Nalet, and that the interest was in him; the second, that the interest was in the plaintiff's loss by capture. At the trial before Lord Ellenborough, C. J., the following facts were disclosed: that Nalet, who was the owner of the *Venus*, was a Dutch merchant, resident in Holland; the plaintiffs were British merchants, resident in London, and by Nalet's directions purchased and shipped, on his account, on board the *Venus*, a quantity of coffee and logwood, with which she sailed on the 15th of February 1809, for Ziroree, in Holland, under a licence. This licence was obtained in pursuance of an order in council, by one W. Vink, the broker of the plaintiffs, who was employed by them to procure it; and it recited that it had been represented to the privy council by W. Vink, on behalf of different British merchants, that they were desirous of obtaining a licence for permitting the *Ve-*

The subjects of a neutral state may insure.

So an insurance may be effected upon the interest of an

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alien enemy, under the protection of a licence from the Crown.

ness, Jan Pieters, master, to proceed under any colours except the French, with a cargo of such goods as were permitted by virtue of an order in council of the 11th November, 1807, to be exported from London to any port between the Texel and Scheldt inclusive, with permission to include a quantity of foreign and prize colonial produce and coffee; and the licence was granted for the purposes set forth in the order of council, and directed the commander of all ships of war to suffer her to proceed as aforesaid, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other hostile or neutral port. The ship and cargo were captured on the voyage off the coast of Holland, and there was afterwards a recapture of the ship and part of the cargo. A verdict was found for the plaintiff. A rule nisi for setting it aside having been obtained in the last term, upon the ground that the licence was insufficient to cover the property of Nolet, an alien enemy; *Per Cur.* This is an insurance upon goods on board the Venus, upon a voyage from London to any ports in Holland or Zealand. The ship sailed under a licence granted upon a representation made by the agent of the plaintiffs, on behalf of different British merchants, for permitting the ship to proceed under any colours, except the French, with a specified cargo, from London to any port between the Texel and Scheldt. The ship and goods were captured on that voyage. And the question arises on the count which avers the goods to be the property of Nolet, an alien enemy. The question comes to this, whether or not the government of this country, in granting this licence, meant to protect that which has been done in this case? It is to be observed, that this is not a licence to any particular persons to export their goods; it states a petition by Vink, on behalf of different British merchants; but the prayer is for permitting a particular ship to proceed under any colours, except the French, with a cargo of goods to be exported from London to any port between the Texel and Scheldt; and the grant is to that effect, and authorizes the vessel to proceed on such voyage. On behalf of the defendant it must be shown to the Court that this licence ought to be limited to British merchants only to export goods which were the property of such British merchants at the time of exportation; but it does not seem to us that this licence ought so to be limited. The licence is silent as to the property of the cargo, to whom it ought to belong; that being so, it may be fairly asked, when we consider the object of this licence, what difference it can make whether the cargo is the property of an alien enemy at the time of its exportation from the ports of this country, or whether it becomes so upon its arrival at the port of destination in the foreign country. If there be no real difference as it affects the purposes of the licence, then the case of *Robinson v. Jouray* does not differ in principle from this; that was a licence on the petition of a British merchant to import into this country a cargo from a foreign country in hostility with this, and the cargo was the property of an alien enemy, a subject of that country; nevertheless it was considered that the licence protected the importation of it into this country, not being confined to the British merchant; and if that licence was held good to protect such a cargo, so ought this, which authorizes the exporting a cargo to a hostile country; so far it appears to us that the principle of that is an authority upon the present question.

12. *KENNINGTON v. INGLIS*. H. T. 1807. K. B. 8 East, 273.

Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured, between the first of October, 1790, and the 1st of June, 1800, a memorandum written on the policy on the 11th of June, extending the time of sailing to the 1st of August, 1800, the question was whether it does require a new stamp, being within the 13th section of the stat. 35 Geo. 3. c. 63. which provides that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the terms or conditions of any policy, &c.

Per Cur. Objection arose on the unstamped memorandum of the 11th of June, 1800, which was said not to fall within the proviso contained in the 13th section of statute 35 Geo. 3. c. 63. And this objection was shaped two

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ways: 1st. That the memorandum was in reality made after notice of the determination of the risk originally insured; and 2ndly. That it introduces a new subject of insurance or thing not before insured. It was argued that it was after notice of the determination of the risk originally insured; because by the terms of the policy the risk insured was goods shipped on board ships which should sail before the 11th of June, at which time it was notorious that the 1st of June was past, and that therefore the risk had determined. But this part of the objection is founded on a misapplication of the term "determination of the risk insured," which means that determination of it which is occasioned by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage; and this memorandum is stated by the bill of exceptions to have been written on the policy, as in fact it must have been before the loss happened. The second way of shaping this objection to the memorandum was, that it introduces a new subject of insurance or thing not before insured, viz. goods on board ships sailing after the 1st of June, the object of insurance being pointed out or marked only by the time of the sailing of the ships on board which the goods should be. To dispose of this part of the objection it is not necessary to determine whether the introduction of a new subject of insurance will, under all circumstances, make a new stamp necessary, inasmuch as we are of opinion that in this case no new subject of insurance is introduced by it: The insurance as it originally stood upon the policy, and the memorandum of the 6th of May, was on goods and specie on board of ship or ships sailing between the 1st of October, 1799, and the 1st of June, 1800, being the property which should first sail to the amount of 45,000*l.*, and upon the vessels which should carry the goods, which, in effect, is an insurance on property to a certain extent, ascertained by its priority of sailing, with a limitation as to the time of sailing, and also an insurance upon the vessels carrying it. The essential part of the description is the priority of the sailing, and the amount of the property; for, after property to that extent had once sailed, the policy could not attach upon any further property exceeding that sum; and if property to a less extent had sailed, a return of premium in proportion to the property sailing short of the sum insured would of course have been demandable by the assured. The property which it was the object of the policy to cover was as much ascertained by its voyage, and by its being that which should first sail, as if it had been described by any other circumstance or mark, by which it might have been distinguished from any other thing; and it was as much the same thing as if it had been a specific chattel capable of appropriate description by its weight, measure, quality, or kind of package; and it would be difficult to show that an insurance on a thing, the identity of which could be so ascertained on ship or ships sailing between the 1st of October and the 1st of June, was not an insurance on the same thing, if the underwriters should agree by a memorandum to continue insurers on it if it should sail in any vessel or vessels between the 1st of October and the 1st of August; the time of sailing would indeed be extended by such agreement, but the object of the insurance would continue the same. So in this case, unless the quantity of property which, to the amount of 45,000*l.* would first sail from the Havannah to Bahama, and the vessels carrying the same, between the first of October and the 1st of June, could be different from that which might first sail on the same voyage between the 1st of Oct. and the 1st of Aug. No new subject of insurance is introduced if the enlarged time of sailing could make property which might sail after property to the amount of 45,000*l.* had sailed, the object of insurance; that is, if it could make the first last and the last first, a new subject of insurance would be introduced; but if it cannot, an extension of the time will not operate to make the policy cover a different thing from that which it originally embraced; for if before the first of June property to the specified amount had sailed, the extension of the time would have added nothing to that which the policy would have covered as it originally stood; and if property to that amount had not sailed before the first of June, the extension of time could only cover, with the protection of the policy, so much of the original subject of insurance which had not sailed before the 1st of June, viz. so much of the 45,000*l.* which

should first sail, but had not sailed before that day; and as the priority of sailing will ascertain the identity of the property, it will equally ascertain the identity of the vessels. For these reasons we think there is no weight in the objections, and that therefore there must be judgment for the defendants, in error the plaintiffs below.

13. *USPARICHA V. NOBLE*. H. T. 1811. K. B. 13 East, 332.

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A Spaniard by birth, who had been domiciled as a merchant in England for several years, having purchased and shipped goods in a neutral vessel, on account of a correspondent, a native of and resident in Spain, obtained a licence from the British government for the vessel to proceed with her cargo, on a voyage from an English port to a port in Spain. A. effected a policy on the goods, which was in the usual form, and stated to be made by A., as well in his own name as in the name of any person to whom the same might appertain. The vessel in the prosecution of the voyage was captured by a French privateer, and carried into a port in Spain, where the vessel and cargo were condemned. At the time of the capture and condemnation, France and Spain were co-belligerent allies at war with England. A. having brought an action on the policy, averring interest in the purchaser, the Court held that A. was entitled to recover, and that the action was well brought in his name, for the benefit of the purchaser; that the legal result of the licence was, that not only the plaintiff, the person licensed, might sue in respect of such licensed commerce in an English court of law, but that the commerce itself was to be regarded as legalized for all purposes of its due and effectual prosecution. That for the purpose of the licensed act of trading (but to that extent only), the person licensed was to be considered as virtually an adopted subject of this country, and his trading, as far as the disabilities arising out of a state of the war were concerned, was British trading; that the plaintiff and the Spanish purchaser of the cargo were actually privy to the objects of the British government, and acting in furtherance thereof, and in direct opposition to the laws and policy of their own country, and that it could not be contended to be illegal to insure a trade carried on in contravention of the laws of a state at war with us, and in furtherance of the policy of our country and its trade, which the trade in question, sanctioned as it was by his Majesty's licence, must be deemed to have been.

14. *HULLMAN V. WHITMORE*. H. T. 1815. K. B. 3 M. & S. 337.

Action on a policy.—The first count averred that the policy was effected by the plaintiffs, as the agents and by the orders of Cornelius Nolet, and that the interest was in him; the second, that the interest was in the plaintiff. Loss by capture. At the trial before Lord Ellenborough, C. J., it appeared that Nolet, who was the owner of the *Venus*, was a Dutch merchant, resident in Holland; the plaintiffs were British merchants, resident in London, and by Nolet's directions purchased and shipped on his account, on board the *Venus*, a quantity of coffee and logwood, with which she sailed on the 15th of February, 1809, for Ziroree, in Holland, under a licence. This licence was obtained, in pursuance of an order in council, by one W. Vink, the broker of the plaintiffs, who was employed by them to procure it, and it recited that it had been represented to the privy council, by W. Vink, on behalf of different British merchants, that they were desirous of obtaining a licence for permitting the *Venus*, Jan Pieters, master, to proceed under any colours except the French, with a cargo of such goods as were permitted by virtue of an order in council of the 11th of November, 1807, to be exported from London, to any port between the Texel and Scheldt inclusive, with permission to include a quantity of foreign and prize colonial produce and coffee; and the licence was granted for the purpose set forth in the order of council, and directed the commanders of all ships of war to suffer her to proceed as aforesaid, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other hostile or neutral port. The ship and cargo were captured on the voyage, off the coast of Holland, and there was afterwards a recapture of the ship and part of the cargo. A verdict was found for the plaintiffs.

And consequently, a native Spaniard domiciled here at the time of war between this country and Spain, having been licensed in general terms by the King to ship goods in a neutral vessel from certain ports in Spain, was held competent to effect an insurance on goods embarked in the protected commerce, and to sue in his own name.

So, subjects who are connected with the adventure as agents for the shipper may effect any insurance for his benefit, though he be an alien enemy, and may maintain an action upon the policy.

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Per Cur. There can be no doubt but that the Crown may remit its rights; the question is, whether the Crown has so done, and legalized this adventure? And it appears to me, upon referring to the words of the licence, that they do not admit of any other interpretation. The licence states it to be an adventure to hostile ports, that is, to any ports within certain hostile limits; it admits of any hostile flag but the French. The adventure is to be in a vessel of a particular name, and with a particular master, under any flag except the French. The licence is sought on behalf of different British merchants, and the plaintiffs answer that description; and it is not restrained as to any particular description of persons to whom the cargo shall belong, but is left open and unlimited; therefore, the cargo may belong to any description of persons: unless that be qualified by other parts of this licence, we cannot adopt the phrase which has been used in argument, that as there are no express words permitting an alien interest, we cannot decide in favour of it, except upon inevitable inference to be drawn from the licence. The phrase cannot be predicated of such a subject: there is not, properly speaking, any inference which must necessarily and inevitably be drawn by all mankind. The mind of each individual must draw its own inference; and here it is submitted to us to draw the inference; and that which we draw from the words of the licence is, that it is a licence to permit the *Venus*, J. Pieters, master, to proceed under any colours, except the French, with a certain cargo from London to any port between the Texel and Scheldt. It limits the vessel by name, and describes the sorts of cargo; and the adventure was beneficial to the British merchants on whose behalf the licence was granted, if not in other respects, at least in the way of commission. The licence looks to an exportation of our surplus produce to an hostile country; it extends to a vessel under any hostile flag except the French. As it has interposed only certain checks, is it not fair to conclude, as to other points where it is left open, that no other restraints were intended? The object is to procure a ship-load of goods and colonial produce, to be exported out of this country. The grant is somewhat more open than the prayer. The prayer is made on behalf of different British merchants, but the grant is for the purpose set forth; that is, for a particular ship to proceed with a cargo to hostile ports; and it is not confined to an exportation of a cargo the property of British merchants, on whose behalf it was applied for. The terms, then, being general, and no restriction being interposed, the Crown must be taken to have authorized the exportation, although it should appear that the property belonged to an alien.

15. *BUSK v. BELL.* T. T. 1812. K. B. 16 East, 3.

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But it is incumbent on a person insured, who claims the benefit of a licence of this description, if he be not the actual grantee, to connect himself in some manner with the licence.
Action upon a policy of insurance on goods by the ship *Christiana*, at and from St. Petersburg to London, in which the loss was averred to be by capture; the principle contention was upon the fact, whether the loss was by hostile capture or by collusion, which fact his lordship left to the jury, who found a verdict for the plaintiff. But a question of law arose at the trial, which it was reserved to the defendant's counsel to move upon the application of the loading licence, covering the adventure, to the persons in whom the interest in the goods was averred in the declaration, and proved to be, who were Dawson, Burrell, and Gascoigne, British merchants, residing at Wakefield, in Yorkshire. The licence, issued by one of the secretaries of state, in pursuance of his Majesty's order in council, under the authority given by the stats. 43 Geo. 3. c. 153. s. 16., and 48 Geo. 3. c. 126. s. 2. was granted to Messrs. Robinson, Clarkson, and Co., of London, merchants, permitting them to load and export, on board the vessel *Christiana*, Schimmels, master, to any port in the Baltic, a cargo of British manufactures, &c., and to import from thence a cargo of grain, if importable, &c., and such goods as are permitted by law to be imported, &c., provided that the name of the vessel, her tonnage, and time of her clearance from her port, should be indorsed on the licence; all which, with other stipulations, were regularly complied with in this case; and a licence was necessary to realize the voyage, inasmuch as Russia was at war with this country at the period of adventure and assurance in question.

Lord Ellenborough, C. J. Here was no evidence of agency given at the trial, but the plaintiff may moot his case at a subsequent trial. At present the rule must be made absolute for a new trial; for I cannot say that a licence to import a cargo given to one set of persons will warrant an importation by another set of persons, unless the latter can connect themselves with the parties licensed.

16. KLINGENDER v. BOND. M. T. 1811. K. B. 14 East, 484.

The property was shown to belong to Lemetre, of Hanover, and the shipment was made at Heligoland by an agent of his of the name of Hampe, who was described in the licence as "Hampe, of London, merchant;" but in fact, though he was just about to leave Heligoland, where he had been residing some time, and to settle in London, he was not yet settled here. It was thereupon objected that the licence was void, as containing an incorrect description of the person to whom it was granted; and Lord Ellenborough, C. J., being of that opinion, nonsuited the plaintiff. On motion to set it aside,

Per Cur. This nonsuit does not bar the plaintiff's action; and upon another trial he may be prepared to tender a bill of exceptions, if so advised, to the judge who refuses the evidence of the licence; but as we cannot think the nonsuit wrong, we dare not consent to grant the rule. Should such a description be deemed not to invalidate the licence, there never will be a licence of this sort that will describe the person correctly, so much is sought to be concealed in these matters. Rule refused.

17. FEIZE v. WATERS. H. T. 1810. C. P. 2 Taunt. 248.

The plaintiff produced the King's licence, which permitted J. Baker and Sons, on board of six neutral ships, the names of which they were unable to set forth, to import from any port in Holland such goods of the sorts therein enumerated, being the property of the said Thomas Baker and Sons, as might be specified in their bills of lading; provided that any who should claim the benefit of that licence should have the same on condition that if any question should arise in any of his Majesty's Courts of Admiralty, or elsewhere, whether such person had in all points conformed thereto, in all cases whatsoever the proof should be on the person using that licence, or claiming the benefit thereof. And in the margin was written "Thos. Baker and Sons; licence to import." Picher, who was the ship's broker, proved that he was in the constant habit of taking out in his own name, and in a similar form, licences for all persons on whose behalf he acted; that he appropriated the licence produced to the ship which brought home this cargo, as one of the six which were to be protected by it; and that the plaintiff repaid his proportion of the fees paid for obtaining it at the Secretary of State's office: he also proved that he was not interested in the goods. But it appeared that the consignors had on the same day, the 20th of Nov. 1804, signed a general bill of lading to Baker of all the goods on board the ship, and particular bills of lading to the particular consignees. The Court thought this was not a sufficient property in Baker to enable him to apply the licence to this cargo, and directed a nonsuit, reserving the point.

Mansfield, C. J. It is admitted on the plaintiff's part that Baker had no interest; he was a mere broker; he had absolutely been paid for the licence. The goods were never destined to be delivered to Baker; they were to go immediately from the captain of the ship to the particular consignees. The general bill of sale is not sent to Baker for the protection of the merchant abroad, nor is Baker in the least degree responsible to him for the goods. If any qualified interest had been consigned to Baker, it might be different; but if that had been the intent, the consignor would never have sent absolute bills of lading to the particular consignees. It appears that since the time of *Defflis v. Parry* the officers of government have found some reason to restrain the generality of their licences. Do not consider the matter as absolutely closed; but, as we are at present advised, we think the licence does not protect the goods. Unless, therefore, we say any thing further upon the subject, the rule must be discharged.

A misdescription in the licence seems fatal.

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The licence cannot be assigned; and if given to a person who has not even a qualified property, it is of no avail.

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18. *Gaige v. Scott*. M. T. 1815. N. P. 4 Campb. 339.

A license by the Crown "to A. & B. on behalf of themselves and other British or neutral merchants; the vessel to sail in ballast from London to Holland, notwithstanding any thing contained in his Majesty's order in council, of a policy of insurance on the ship in this voyage." The defence was, that the voyage was illegal, England being then at war with Holland, and his Majesty having, by order in council of the 26th of April, 1809, placed all the ports of Holland, as far north as the Erns, in a state of blockade. It was objected by the defendant, that this license, granted to British or neutral merchants, could not protect an alien enemy; while the plaintiffs contended, that it must be taken to have been granted to the ship, to whomsoever she might belong, and that government must be considered to have known the circumstances under which she was in this country; and they relied upon *Hageden v. Reid*, 1 M. & S. 567.

Gibbs, C. J. I think the license insufficient. It dispenses with the order in council, but does not amount to a remission of the King's belligerent rights to an alien enemy. The petition not being here, I can only look to the license itself, to ascertain the intentions of government in granting it. It is granted "to Reid and Morgan, on behalf of themselves and other British or neutral merchants." If it had permitted a cargo to be taken on board, and this had been proved to belong to British or neutral merchants, it would have protected the ship, though the property of an enemy. That was the case of *Hageden v. Reid*, 1 M. & S. 567. But the licence is only to the ship to return in ballast, and nothing appears to show that it was meant to legalize the voyage to whomsoever the ship might belong. The petition might disclose such circumstances, but it is not before us. The words in the license pointed out by Mr. Spankie, "notwithstanding any thing contained in his Majesty's order in council of the 26th of April, 1809," are strong to show that its object was to dispense with that order, and not at all events to remit the belligerent rights of the Crown.

19. *HAGEDEN v. REID*. E. T. 1813. K. B. 1 M. & S. 567; S. C. 3 Campb. 377.

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Policy, dated 2nd of August, 1810, on the ship *Fiesco*, at and from *Gluckstadt*, and any port or ports in the river *Elbe*, to any port or ports in the United Kingdom. The interest was laid in one *Schroder*. The ship was captured; and the only question was, whether the insurance was legalized? *Gluckstadt* is a port under the dominion of Denmark, with whom we were then at war, and *Schroder*, the owner of the ship, resided there. A copy of a licence was produced, dated 2nd of June, 1810, and granted to "J. H. P. *Hageden*, of London, on behalf of himself and other British or neutral merchants," permitting a vessel bearing any flag except the French, to proceed with a cargo from any port within certain limits, comprehending the river *Elbe*, to any port of the United Kingdom. The original licence was transmitted to one *Doonman*, a merchant at *Hamburg*, which city was then in a state of neutrality. He was stated to have ordered the shipment of the goods; but there was no legal evidence that they belonged to him or any other British or neutral merchant.

Lord Ellenborough. Had the cargo been proved to be the property of any British or neutral merchants, by whom or on whose account the licence was taken out, I think that licence would have protected the ship of an alien enemy during the adventure. The importers must be British or neutral merchants; but the ship might bear any flag except the French. Government, therefore, seems to have contemplated that it might be necessary to employ a ship belonging to an alien enemy, and to have authorised that act, so that she was not French; some evidence, however, is necessary, that the cargo belonged to British or neutral merchants. Though the licence would legalize the means of the importation, you must show the importers were of the description which the licence specifies; the condition on which it was granted must be proved to have been fulfilled. I cannot presume that goods loaded in

a hostile port were not enemy's property, merely because the licence for the voyage was transmitted to a neutral. Plaintiff nonsuited

20. NEUKER v. ANSLEY. E. T. 1816. K. B. 5 M. & S. 25.

Assumpsit upon a policy of assurance, dated 18th of July, 1810, on goods on board the ship *Fortuna*; the interest was averred to be in P. B. Smit and Co., and the loss by seizure and detention of persons unknown.—Plea, *non assumpsit*. The policy was effected by the plaintiffs, as agents, on account of P. B. Smit and Co., on goods to be thereafter declared and valued, which valuation was afterwards made at and from London to Riga, or any port or ports, place or places in the Baltic, backwards and forwards, and until the goods were safely delivered at the houses or warehouses of the consignee, *selfes and &c.*, at a premium of 25 guineas per cent. to return 15l. per cent. for convoy on arrival; and it was declared to be against all risks. This policy was effected under these circumstances in July, 1810; the plaintiffs received orders from the agent in this country of Smit and Co., who were domiciled and carrying on trade at Riga, to ship for their account a cargo of goods for Riga, the agent having for this purpose chartered the ship *Fortuna*, then at London, in the name of the plaintiffs; about the same time the plaintiffs gave orders to Castendick and Hentz, ship brokers in London, to procure a licence for the voyage, which Castendick accordingly applied for and obtained from the British government, without disclosing in their petition to the lords in council, that such application was on behalf of Smit and Co. The order in council was dated the 6th of July, 1810, and was stated to be made upon the petition of Castendick and Hentz, on behalf of themselves and British or neutral merchants, permitting them to load and export on board the Russian ship *Fortuna*, bearing any flag except the French, a cargo of wine, &c. British manufactures, British and foreign colonial produce, East India goods, and such goods as are permitted by law to be exported, except hemp, from London to any port in Sweden or the Baltic not under blockade, and to import direct from the port of discharge, or to sail in ballast from the said port to any port in the Baltic, not under blockade, and to import from thence a cargo of grain, if importable, according to the provisions of the corn laws, and such goods as are permitted by law to be imported, except fish and fish-oil, to any port in the United Kingdom; the master to be permitted to receive his freight and detain part with his vessel and crew to any port not blockaded, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other neutral or hostile port, and to whomsoever such property may appear to belong, &c. The licence was of the same date, and in pursuance of the order which was annexed, and pursued the terms of the order. The plaintiffs in consequence effected the policy in question, and on the 9th of August loaded the goods on board the said ship, for account and risk of Smit and Co., and consigned them to Smit and Co., at Riga.

Per Cur. The single question is, whether this licence legalized the voyage? Adverting to the words of the licence and the object of granting it, we cannot help thinking that it contemplated a Russian risk; for if it had been intended to prohibit such risk, we should expect to find some words of restraint. The licence, it is true, is to Castendick and Hentz, on behalf of themselves and British or neutral merchants, but it is also to load and export on board a Russian ship, with full liberty to go to a Russian port, so that it is obvious the parties licensed might have to deal with Russians. It was suggested in argument that this licence might possibly have legalized the importation of a Russian cargo into this country, but that it was different with respect to the allowing a Russian interest to export from hence; we cannot see any reason for the difference, or why under this licence British capital and British risk should be employed in the outfit rather than a Russian capital and Russian risk. The great object of the licence was to relieve the British market of those articles with which it was overstocked, and to supply a commodity of which this country stood in need. This object was to be obtained as well at the hazard of Russian as of British risk, and British capital would be employ-

ed, whether the cargo was loaded on British or Russian account; the British merchant would benefit by his commission on the export and import cargo, and the Russian would be content to bring his cargo to this country, provided he was at liberty to export one from it. The language of the licence is to load and export; it is not said that this must be done by the persons licensed on their own account; it is enough, therefore, that the British merchant purchases and loads a cargo for exportation on account of the Russian merchant. The material distinction between this case and that of *Hagedorn v. Bazett* is, that here the licence points out the ship as being of a hostile character, in that case it did not: on these grounds it seems to me that the licence legalized the voyage.

21. *VANDYCK v. WHITMORE*. E. T. 1801. K. B. 1 East, 475.

If the licence contains a condition, it must be performed, in order to make it available;

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On a bill of exceptions it appeared the plaintiffs in the court below brought their action against Mr. Kensington, an underwriter, on a policy dated Feb. 1800, at and from the Havannah and Matanzas, or any other port or ports in Cuba, to Nassau, New Providence, upon goods, and also upon ship or ships sailing between two given periods of time. The declaration averred, that Kensington subscribed the policy for 500*l.* on goods and specie; and that, by a subsequent memorandum, it was agreed, that the value of any vessel or vessels that should carry the goods insured should be included in that insurance; and that Robert Read, for whose benefit the insurance on the goods and specie was made, was interested in such goods and specie; and that one Juan Villas, for whose benefit the insurance on the ship *Hector* was made, was interested therein. The second count of the declaration averred that the ship *Hector*, on board which the goods and specie were loaded, did not belong to his Majesty or any of his subjects. The bill of exceptions, amongst the other necessary facts, not material here, stated that Inglis and Co. effected the policy, and that a certain cargo of goods and specie belonging to Robert Read had been shipped at the Havannah on his account, being part of the property insured on board the *Hector*; and that the policy was made in respect of the said goods and specie for his benefit; and, in respect of the said ship, for the benefit of the said Juan Villas; and that Juan Villas was a Spaniard by birth, then and still residing in the dominions of and adhering to the King of Spain, between whom and the King of Great Britain there existed an open war, as well at the time of effecting the policy, as also at the time of trial; but that the action was commenced in time of peace. The loss of the ship by perils of the sea is there stated between the Havannah, a colony of the King of Spain, and Nassau, a colony of our King. The bill of exceptions further stated, as applicable to this point, his Majesty's instructions to General Dowdeswell, governor of the Bahama islands (New Providence being one,) authorizing him to grant license for the importation into those islands of specie, and such goods as were loaded on board the *Hector*, in any British or Spanish vessel of a certain built (within which the ship *Hector* might be called,) from any Spanish colony in America, notwithstanding the then existing hostilities; and the commanders of his Majesty's ships, and also privateers, were enjoined not to detain or molest any vessel trading between the ports therein specified, conformable to the said regulations, and having a license for that purpose. It further appeared, that a license was granted by the governor to Robert Read for the *Hector* for the voyage out and home, and was not limited in point of time, and was to enable the *Hector* to bring the goods therein enumerated from the Spanish settlement to New Providence. That by the laws of Spain, vessels coming from a Spanish settlement in time of war cannot clear for a British port, but it is the practice to clear for a Spanish or neutral settlement; that the witness was the governor's secretary, knew the *Hector* to be a Spanish vessel, and the property of a Spaniard, and she was so described in the licence. Upon this point, the counsel for the underwriter took an objection at the trial, that, though the voyage and trade were licensed, the plaintiffs, Inglis and Co. could not enforce a policy for the benefit of Juan Villas so being such alien as aforesaid. But the Chief Justice Mansfield was of opinion that a ship belong-

ing to an alien might, when so licensed, be lawfully insured by a British subject; and that the policy so effected might be enforced by such British subject in a court of law for the benefit of such alien owner. This opinion was excepted to; and after argument upon the bill of exceptions, in which it was contended that the license only protects the goods, but does not give to an alien enemy the right to sue, either in his own name, or in the name of his trustee, the Court took time to deliberate; and now Lord Ellenborough delivered the unanimous judgment of the Court. As to the question, whether the plaintiffs upon this record, who are British subjects, duly competent to sue in their own persons, can in a court of law enforce by suit a policy for the benefit of another person who was an alien enemy when the policy was effected, was so at the trial, and still is so; the negative is strongly contended for on behalf of the underwriter on the authority of the cases of *Bristow v. Towers*, 6 Term. Rep. 35; and *Brandon v. Nesbitt*, *ibid.* 23. But it will be recollected, that in those cases, the party interested, and on whose behalf the suit was maintained, was an alien enemy, against whose recovery through the medium of his British trustee there existed this objection;—that the property to be covered by the policy belonged to an alien enemy, and that any protection afforded to such property by means of a contract of indemnity, directly and materially contravened the public interest, which was concerned in the precariousness or destruction of such property. In the present instance no such public policy of the country is contravened by sustaining and giving effect to such a trust; but, on the contrary, this country, in furtherance of the same policy, which allows the granting licenses to authorise the trade, ought to give effect to the ordinary means of indemnity, by which that trade, from the continuance of which the public must be supposed to derive a benefit, might be best promoted and secured. And although the King's license cannot, in point of law, have the effect of removing the personal disability of the trader in respect of suit, so as to enable him to sue in his own name, it purges the trust in respect to him of all those injurious qualities in regard to the public interest which constituted the public ground of objection to the trust in the two cases just referred to, and which have been so much relied on, on the part of the plaintiff in error. As, therefore, there is in the case no legal incompetence to sue in the parties actually suing, and no public interest which stands in the way of maintaining the suit, for the benefit of those who were the objects of the license authorizing the trade in question, it does not appear to us that the right of the assured to recover can well be resisted on that ground. The next question which comes to be considered is, whether it be lawful to insure the property of an enemy when not protected by a license? Whatever doubts might formerly obtain in England, either as to the legality or expediency of such insurances, the question is now finally settled in the negative by two unanimous decisions of the Court of King's Bench.

22. *SHIFFNER v. GORDON*, E. T. 1810. K. B. 12 East, 302.

The facts are detailed post, p. 54.

Lord Ellenborough, C. J. It is a settled rule that, where a contract which is illegal remains to be executed, the Court will not assist either party in an action to recover for the nonexecution of it. It is a very dangerous question for the plaintiff to stir in this case, if we are pushed to decide upon it, whether this were not one entire mixed cargo of British and enemies property in each ship, respectively covered by the several policies, on which the premium was not divisible; but, as the defendant's counsel has consented to waive the question, and to admit the plaintiff's right to recover so much of the premium as covered the British risk, it is unnecessary to say more upon it. There can be no doubt in this case, that part of the cargo of the several ships which was to have been imported into this country, being forbidden by the navigation laws, and which, therefore, the King's license did not extend to cover, the underwriters upon the policies never run any risk, at least as to that part; and, therefore, there is no pretence to say that the plaintiff can recover the premium for it.

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And not so
lourably.

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(B) RELATIVE TO WHAT PROPERTY AND INTEREST MAY BE INSURED.

1. *BRISTOW v. TOWERS*. M. T. 1794. K. B. 6 T. R. 35.

No insur-
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The special verdict stated, that the plaintiff, on the 13th March, 1793, being then resident in Great Britain, in pursuance of an order for that purpose, caused the insurance in question to be made on account of Arrouet, Massat, and Co. and that the goods insured were by the policy warranted French property, and were so in fact; that the goods, which consisted of buttons, buckles, &c., of the manufacture of this kingdom, were shipped on board the Nancy (an American ship) on the 19th March, 1793, by Messrs. Humphreys, of Birmingham, in compliance with orders received in January, 1793, from Messrs. Arrouet, Massat, and Co., who were and still are subjects of France; that, by two orders in council, of the 11th of February, 1797, general reprisals were granted against the ships, goods, and subjects of France, and a general embargo was laid on all vessels in Great Britain; but, by another order of the 26th of February, the said general embargo was declared not to extend to foreign vessels belonging to the subjects of any state in amity with his Majesty, but that they might forthwith proceed on their respective voyages, provided the cargo did not consist of naval or military stores, or any other article the exportation whereof was prohibited by any law or order of council then in force. The verdict then stated the sailing of the ship on the voyage insured on the 21st of March, 1793, the subsequent capture of the vessel by some English subjects, and the condemnation of the goods insured as French property. This special verdict was fully argued at the bar, and a second argument was ordered; but after the decision of *Brandon v. Nesbitt*, the counsel for the plaintiff said that he declined the further argument of the case, as he had no hopes of convincing the Court that this case could be distinguished from the principle on which the former had been so recently determined.

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2. *POTTS v. BELL*. E. T. 1800, K. B. 8 T. R. 548.

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Upon a writ of error it appeared, from a bill of exceptions, that at the trial the plaintiffs below proved in evidence the policy of assurance in the declaration mentioned, subscribed by Potts, and dated the 7th of December, 1797; and that the policy was effected in London by Barret and Company, insurance brokers there, by the order, and for the benefit and risk of the plaintiffs there, and still being British merchants resident in London, and interested in the goods insured to the value mentioned. That the ship *Elizabeth* was a neutral ship, belonging to H. Bannermamia and son, of Greetsil and Emden, in Prussia, bound on the voyage insured from Rotterdam to Hull; and that the clearance of the ship was ostensibly from Rotterdam to Norden, because the persons then exercising the powers of government in the United Provinces would not permit the ship to be cleared out from Rotterdam to Hull, or any other part of Great Britain; and that the goods insured, consisting of sixty casks of madders, were laden on board the *Elizabeth* at Rotterdam, to be conveyed from thence to Hull by one Robert Twiss, then being the agent of the plaintiffs below, and residing at Rotterdam, by their orders and for their use, and were consigned by him to Messrs. Hewson and Gunnes at Hull, who then were the agents of the plaintiffs below, by their order and for their sole account and risk. That the ship *Elizabeth*, having the goods insured, afterwards, on the 18th of December, 1797, sailed from Rotterdam for Hull, and was captured on the next day by a French ship, an enemy to the King; whereupon the counsel for the plaintiffs in error, on his part proved in evidence that the said sixty casks of madders, before the lading of them on board the *Elizabeth*, and before the policy was subscribed, were purchased by Twiss, their agent, resident at Rotterdam, in order to be sent from Rotterdam to Hull, on their account and risk at London, and were afterwards laden on board the ship at Rotterdam for that purpose. The six bills of exchange were drawn by Twiss, in payment for the madders at Rotterdam, but dated at Hamburgh, upon the defendant's in error, and which bills having been indorsed by the parties thereof respectively, were afterwards duly accepted and paid by the said de-

defendants in error in London. That before and at the time of the said purchase of the said sixty casks of madders by Twiss, and of the loading of them on board the Elizabeth, in order to be conveyed from Rotterdam to Hull, for and on account of the defendants in error, and also before and at the time that the plaintiff in error subscribed the policy of assurance thereon, and before and at the time of the ship's departure from Rotterdam towards Hull, and of the capture of the said ship and madders as aforesaid, hostilities had commenced, and still existed between Great Britain and the persons exercising the powers of government in the said United Provinces. That the plaintiff in error also proved the payment of the premium into Court in this action; whereupon the counsel for the plaintiff in error insisted at the trial that upon the matter so proved in evidence the plaintiffs below were not entitled to recover against him; that the policy upon the said madders was void, for that it is not lawful for British subjects to carry on trade with any nation which at the time is in a state of open war and hostilities with Great Britain, or to purchase any goods in such nation, and import them from thence to Great Britain. The bill of exceptions then stated the judge's directions to the jury to find a verdict for the plaintiffs below, the finding of such verdict accordingly, and the assignment of error thereon in the usual form. The Court said, they had very fully considered the question immediately after the very learned argument of counsel; that the reasons which he had urged and the authorities he had cited, were so many, so uniform, and so conclusive, to show that a British subject's trading with an enemy was illegal, that the question might be considered as finally at rest. That those authorities, it was true, were mostly drawn from the decisions of the Admiralty Courts; and after all the diligence which had been used, there was only one direct authority on the subject to be found in the common law books, and that one was to the same effect; but that the circumstance of there being that single case only was strong to show that the point had not been since disputed: and that it might now be taken for granted that it was a principle of the common law, that trading with an enemy without the King's licence was illegal in British subjects. That it was therefore needless, in this case, to delay giving judgment for the sake of pronouncing the opinion of the Court in more formal terms; more especially as they could do little more than recapitulate the judgment, with the long train of authorities already to be found, in the clearest terms, in the printed report of the case of the sloop, published by Dr. Robinson. That the consequence was, that the judgment of the Court of Common Pleas must be reversed.

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3. *SIFFIN v. ALLNUTT*. H. T. 1813. K. B. 1 M. & S. 39.

A licence was granted to the plaintiff on the 25th of May, 1810, to take a cargo from London to Archangel, and to return from thence with a cargo of grain and other goods permitted by law to be imported to any port of the United Kingdom; and the licence was limited to the 29th of September following, which time was afterwards extended to the 1st of January, 1811; and the ship, after taking in a cargo of pitch and tar at Archangel sailed on her homeward voyage on the 13th of October, 1810, but was driven back to Archangel, and there unloaded, and her cargo sold, and the ship laid up for the winter, and did not sail again from thence with a cargo of wheat until the 1st of August, 1811: the Court held, that the licence was not exhausted by taking the first cargo of pitch and tar, but would cover the cargo of wheat also, notwithstanding the time limited for its continuance had elapsed, provided it appeared that the voyage was prosecuted with all reasonable dispatch, which was a question for the jury; and, therefore, if it should so appear, an insurance effected by the plaintiff on the 18th of August, 1811, on wheat at and from Archangel to London, would be valid, and would attach on the wheat cargo; but an insurance on money advanced to the captain at Archangel was void, and upon that the plaintiff might recover back the premium.

4. *SHIFFNER v. GORDON*. E. T. 1810. K. B. 12 East, 295.

The plaintiff being an underwriter, and the defendants extensively engaged in the Spanish trade between the latter end of 1804 and the middle of 1807, the plaintiff underwrote many policies effected by the defendants, the account

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And if any fraud appears, the licence will be deemed invalid;

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of all which was settled in October, 1807, when the plaintiff paid to the defendants a balance of 66*l.* 0*s.* 10*d.* ; other policies were afterwards underwritten by the plaintiff for the defendants in 1807 and 1808 ; and on a balance of the accounts there remained due to the plaintiff 328*l.* 6*s.* 11*d.* for which this action was brought. This balance consisted of the following sums, viz. 93*l.* 4*s.* 2*d.* undisputed premiums, and 235*l.* 2*s.* 9*d.* disputed premiums; the latter sum being upon the seven following policies; viz. ship *Liberty*, from Cadiz to Vera Cruz, 5th August, 1807; *Herald*, Vera Cruz to London, to touch at the Havannah, 2nd October, 1807; *Neutrality*, Vera Cruz to Great Britain; with liberty to touch at the Havannah, 12th November, 1807; *Monticello*, Cadiz to South America, 18th November, 1807; *Jupiter*, Cadiz to Vera Cruz, 16th January, 1808; *Conception*, Cadiz to Vera Cruz, 17th November, 1807; *Statira*, Vera Cruz to England, with liberty to touch at the Havannah, 6th January, 1808. All the above seven ships were neutral, being either Americans or Danes, and Spain and England were at war when the several voyages insured commenced and ended. The cargoes on board the said ships belonged partly to the defendants and partly to their correspondents resident in Old and New Spain, the object of the voyages being to bring dollars, indigo, and other produce of Spanish South America to England; and such produce was brought accordingly. At the time when the plaintiff subscribed these policies it was represented to him by the defendants' agents, who effected the insurances on their account, that his Majesty's licenses had been granted for the said ships upon the voyages then about to be insured, and that such licenses would cover hostile as well as British property, and upon the faith of such representation, the policies were underwritten; and, in fact, his Majesty's licenses for all the seven ships had been procured. The policies were in the common form, and did not contain any warranty for licenses. The several licenses were in this form: "George the Third, &c. To all commanders of our ships of war, &c. Whereas we were graciously pleased by our royal license dated the 6th of June last, to permit Messrs. Gordon and Murphy, Messrs. Read, Irvin, and Company, and other British merchants, or their agents or bearers of their bills of lading, on board of one neutral vessel, the name of which they are unable to set forth, to export and convey from any port or ports of Spain, or from any of the Canary Islands, directly or circuitously, to some Spanish port in South America, a cargo, consisting of manufactured goods, with an assortment of quicksilver, paper, and cards of Spanish manufacture, wines, brandies, and all other innocent articles as might be specified in their bills of lading, and in return for the said goods so to be exported, to convey and transport by the said vessel from any of the Spanish ports in South America, directly or circuitously, to any of our colonies, islands, or plantations, in the West Indies or in Europe, or to any port of our United Kingdom, such quantity of the produce of the Spanish colonies and bullion as might be specified in their bills of lading, and being their property or that of other British subjects, or the property of the subjects of any state at present in amity with us, and not being the property of our enemies, and that said vessel should proceed on her intended voyage without molestation by any of our ships of war or privateers, either on account of the existing war, or of any other hostilities which might hereafter take place; and whereas it hath been represented to us, that the Danish ship *Neutrality*, Hahor Eliesen, master, took the benefit of our said licence, on a voyage from Barcelona to Vera Cruz and the Havannah, and to return to a port of our United Kingdom; and that the said voyage and adventure was undertaken after a communication with the Lords Commissioners of our Treasury, and for the purpose of procuring a quantity of dollars, which were and still are necessary to our public service; and in the course of such communication, it was fully understood that the cargo to be sent or brought back on board such vessel might be in part or in the whole Spanish property; and whereas, by the terms of the said licence, it has been required that the said cargo shall be British or neutral property, we taking into our consideration the premises and the urgency of the public service in this behalf, are graciously pleased to grant our royal license and protection for the said cargo and bullion going or return-

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ing on board the said vessel, notwithstanding any thing contained in our order of the 7th of January last to the contrary, and notwithstanding the said cargo and bullion may appear to be and be Spanish property; provided nevertheless that the said vessel, in her return voyage from the Spanish colonies, shall proceed directly or circuitously to any of our colonial islands, plantations, or settlements in the West Indies or in Europe, or to Gibraltar, or to any part of the United Kingdom, notwithstanding she may appear by her clearances to be destined to some other country; and upon condition that security shall be given by the said Messrs. Gordon and Murphy, to the satisfaction of the Lords Commissioners of our Treasury; that in as far as may depend upon their *bona fide* endeavours the quantity of dollars agreed upon shall within twelve months from the date hereof be brought from the Spanish colonies; provided also, that the license hereby granted shall remain in force eighteen months from the date hereof. And we do hereby in all other respects confirm our license hereinbefore recited, and we further direct and strictly enjoin the commanders of our ships of war and privateers of her said voyage. Dated, St. James's, 22nd of January, 1807; and countersigned Spencer." The ship *Neutrality* was taken by a British privateer, and whilst in her possession was lost by the perils of the sea, and plaintiff had resisted the payment of the loss upon certain legal objections, which the Court had decided in his favour, though he had paid the defendant's losses on other ships in similar voyages. The defendant paid no money into Court, and the question was, whether the plaintiff was entitled to recover the 328*l.* 6*s.* 10*d.*, being the full amount of his demand, including the premiums upon the seven policies, or such part of the premiums only as was sufficient to cover the interest of the defendants in the several cargoes thereby insured, besides the sum of 93*l.* 4*s.* 2*d.*, for which it was not disputed that the plaintiff was entitled to a verdict. If the Court were of opinion that the plaintiff was entitled to recover only such part of the premiums as would be sufficient to cover the interest of the defendants in cargoes insured by the seven policies beyond the sum of 93*l.* 4*s.* 2*d.*, then the amount of such interest was to be ascertained by an arbitrator, and the verdict was to be reduced accordingly.

Lord Ellenborough, C. J. It is a settled rule, that where a contract which is illegal remains to be executed the Court will not assist either party in an action to recover for the non-execution of it; it is a very dangerous question for the plaintiff to stir in this case, if we are pushed to decide upon it, whether this were not one entire mixed cargo of British and enemies' property in each ship respectively, covered by the several policies on which the premium was not divisible; but as the defendants' counsel has consented to waive the question and to admit the plaintiff's right to recover so much of the premiums as covered the British risk, it is unnecessary to say any more upon it. There can be no doubt in this case that part of the cargo of the several ships which was to have been imported into this country being forbidden by the navigation laws, and which, therefore, the King's license did not extend to cover, the underwriters upon the policies never ran any risk, at least as to that part; and therefore there is no pretence to say that the plaintiff can recover the premiums for it.

5. BLACKBURN V. THOMPSON. H. T. 1812. K. B. 15 East, 81.

The King having, by orders in council, declared certain ports in St. Domingo not hostile, which had formerly been, but were no longer, in the possession nor under the dominion of France, though such declarations were made for collateral and limited purposes, not covering in their terms the trading question, or trading to such ports from parts of the King's dominions not named in such prior limited orders, was held to be legalized the same as to neutral ports in general, by such authoritative recognition of those ports in St. Domingo not being hostile, and the inference as to the legality of such neutral trade is not rebutted by a subsequent order of council opening the trade gen-

* Or, there being a sufficient pre-existing one, an additional insufficient licence be obtained, it will not prejudice the former; see *Siffin v. Allnut*, 1 M. & S. 32.

erally, so as to cover in its terms the particular adventure to all ports of St. Domingo not in the possession of France; and such trade to neutral ports, requiring no licence from the crown, is not restricted by the fact of a British ship carrying a licence for trading to them from Great Britain with a certain specified cargo; but the British trader may, notwithstanding, carry other lawful goods, and insure his whole adventure, and may recover from the underwriter a loss arising from capture by a British cruiser, though induced by the fact of such trading with goods not covered by the licence, which was produced to the captor; for the licence itself not being necessary, the carrying of goods not included in it was no legal cause of seizure, however it might operate upon the question of costs in the Prize Court.

6. *PIESCHELL v. ALLNUTT*. E. T. 1813. C. P. 4 Taunt. 792.

So a licence sanctioning the importation of one description of property and prohibiting another, will protect the privileged part of the cargo.

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The vessel was a Hamburgher, and sailed from Gluckstadt on the Ems, after a licence granted by the King in council, to Messrs. Castendyck and Hentz, on behalf of themselves and others, and permitting a vessel bearing any flag to import a cargo of corn, and many other enumerated commodities (not including books), and no other articles whatever. There were put on board several cases of books, not the property of the assured, nor covered by the policy, but on account of Macdonald, a London bookseller, the freight whereof amounted to 43*l.*, being about one-seventh part of the freight of all the goods on board, which together amounted to 300*l.* The ship was lost on the voyage to London. For the defendant it was objected, that the importation of the books was illegal, unless licensed; and that no licence having been obtained which included them, the defect vitiated the whole adventure, and rendered the vessel and cargo liable to be confiscated, and that the insurance was therefore void; and upon this ground the Chief Justice nonsuited the plaintiff, with liberty to move to enter a verdict for the amount of the defendant's subscription.

Per Cur. In the Court of Admiralty, if the ship, goods, and books had been libelled, the books would have been condemned, and the ship and other goods would have been restored; and if they ought to be restored, we can find no ground why they should not be insured; we are further of opinion that this adventure required no licence, it not being within the operation of the order of the 6th of April, 1816, that being released by the subsequent order alluded to; and we are further of opinion, that the circumstance of the books being on board, which belonged to Macdonald, the bookseller, does not render the whole of the adventure illegal, nor the insurance void.

7. *KEIR v. ANDRADE*. H. T. 1816. C. P. 6 Taunt. 498; S. C. 2 Marsh. 196.

As a certain quantity of gunpowder the excess is not protected, and therefore not insurable.*

This was a motion for a nonsuit, on the ground that the goods, the subject of the insurance, were illegally put on board. It appeared that the ship sailed on the 5th of November, 1814, and was captured in the course of her voyage by an American privateer; that she had on board 300 barrels of gunpowder, which formed the chief part of the cargo; that a licence, dated 21st of October, had been granted to the plaintiffs, by name, for 150 barrels, and that another licence, dated 24th of October, had been granted to Messrs. W. R. and Co. to export 150 more; but that licence was not produced, and there was no evidence to show any privity between them and the plaintiffs, or that the second licence applied to the gunpowder in question. The bill of lading was marked in the margin I. L. 150, and W. R. 150, which it was suggested referred to the plaintiffs, and to W. R. and Co. respectively; but the jury said,

* In the case of a vessel importing into this country from a hostile nation, a cargo consisting of goods for which a licence has been obtained, as well as others which are not licensed, if the ship and cargo be libelled in the Court of Admiralty, the unlicensed goods will be condemned, but not those licensed; 4 Taunt. 795, 796. In the case which has been mentioned of the exportation of gunpowder contrary to a proclamation, the powder exported without a licence, together with the vessel carrying it, is exposed to confiscation, and the parties are rendered liable to penalties, 29 Geo. 2. c. 16. s. 2; 33 Geo. 3. c. 2. s. 4; but the part of the cargo which is protected by a licence is not, in this instance, any more than in the other, exposed to seizure, and consequently in neither case does there appear to be any ground upon which an insurance can be impeached to the extent of the licensed portion of the cargo.

that these marks were very arbitrary, and that nothing could be inferred from thence to the owners of the goods. It was objected for the defendant, that the licence to W. R. and Co., even supposing that this applied to the second 150 barrels, could not be transferred to the plaintiffs, and therefore that the whole voyage was illegal. The learned judge expressed no decided opinion on the subject, except that an act prohibiting the exportation of gunpowder in time of war was to be strictly enforced; but directed a verdict for the plaintiffs, reserving to the defendant liberty to move to set it aside.

Per Cur. The question arises on the exportation of gunpowder, as prohibited by certain statutes. Now, on this subject, we must look to the forfeitures and penalties imposed by these statutes; for those regulations are to be found in the statute-book only; and it appears by those statutes that the powder which is exported contrary to the proclamation, and the ship exporting it, are subjected to confiscation, and that the parties are made liable to penalties, but nothing more. The facts of this case are, that the plaintiffs, being desirous of exporting some gunpowder, obtained a licence for 150 barrels, which were put on board, together with 150 more, for which no licence had been obtained. We take the fact as it stands, taking no notice of any thing which was suggested as accounting for that circumstance, because nothing of the kind was proved. The plaintiffs caused their goods which were sent on this voyage to be insured, and a loss happened by capture. When the underwriters are called upon to pay the loss, they defend themselves on the ground that the voyage was illegal; or at least, that there is something in the transaction which vitiates it as to the plaintiffs, and puts them out of a situation to recover against the underwriters; that as part of the powder, which was the subject of the insurance, was exported without a licence, the whole insurance was illegal. We have no difficulty in dealing with the excess of the powder above that for which the licence was obtained; for, as the exportation of that excess was illegal, the insurance of it was certainly illegal also. But the 150 barrels, for which the licence was obtained, stand on a very different ground. If they could not have been seized as forfeited, there is no ground on which the insurance of them can be impeached. It appears from the acts, that the powder which is exported without a licence, and the ship which so exports it, are both forfeited; but no other part of the cargo, whether belonging to the persons who have so illegally exported part of it, or to any other person, is made subject to forfeiture; the insurance, therefore, of such other parts is good. It has been contended, that the licence can be applied to no part of the cargo, because of the 150 barrels which were put on board after it had been obtained; but we think that the 150, for which the licence was obtained, remain untouched by the illegality of the other transaction, and that as far, therefore, as the insurance on that number extends the action may be supported, but no further; and, consequently, that the value of the powder exceeding that number must be deducted. [59]

8. *PARKIN v. DICK*. M. T. 1809. 11 East, 502; S. C. 2 Campb. 221.

A policy was effected on goods to be thereafter specified to a certain amount; by the specification it appeared that the goods consisted principally of hardware, but partly of naval stores, the exportation of which was prohibited, under pain of forfeiting the stores, treble their value, and the ship. The Court held, that the exportation of the stores being illegal, all contracts for protecting the stores so exported were impliedly avoided; that the policy was one entire contract on goods to be thereafter specified, to which the underwriters subscribed, and the subsequent specification by the assured could not alter the nature of the contract with respect to the underwriters, so as to sever that which was originally one entire contract. And doubts have been entertained whether the insured can recover to any extent when a part of the cargo covered by the policy is tainted with an illegal character; [60]

9. *CAMELO v. BRITTEN*. M. T. 1820. K. B. 4 B. & A. 184.

Action on a policy of insurance. The defendant subscribed the policy for 200*l.*, and the plaintiff was interested in the goods insured. The plaintiff was by birth a Portuguese subject, but had been domiciled in London, and had carried on trade there as a merchant since the year 1809. Pernambuco and And by a very recent case that doctrine has been confirmed.

Maranhão are parcel of the dominions of the crown of Portugal. The *Venus*, the ship mentioned in the policy, was chartered by Messrs. Josling, Allen, and Freireira, Portuguese merchants in London, in January, 1817, to carry out a cargo of sundry merchandize to Pernambuco and Maranhão, and to bring back a return cargo. The goods insured consisted of nine hogsheds of Madeira wine, six pipes of red wine, thirty barrels of small or bird shot, four rolls of sheet lead, ten cases and fourteen larks of manufactured goods, and 100 barrels of gunpowder. For a number of years past gunpowder had been usually shipped from this country to Pernambuco and Maranhão, and imported there; but if the Portuguese government did not choose to purchase such gunpowder, the shipper was obliged to re-export it, unless in occasional instances, where a sale to other people has been allowed by that government. The form of shipping goods, including gunpowder, in London, on a voyage to Pernambuco and Maranhão, has been to exhibit the cockets and manifest at the office of the Portuguese consul, who certifies the same, and affixes his consular seal to them; the cockets and manifest so certified proceed with the ship, and must be delivered at the custom-house at the destined port before the ship is admitted to entry. Copies of them are likewise sent by the Portuguese consul in London to the custom-house at the port of destination by the first opportunity. The *Venus* was cleared in this form at the office of the Portuguese consul for the voyage in question; she carried 400 barrels of gunpowder, 300 having been shipped by Josling, Allen, and Freireira, on their own account, and the remaining 100 on account of the plaintiff. The cockets and manifest of the whole cargo were certified in the manner above stated, and proceeded with the ship to be exhibited to the custom-house at Pernambuco. The whole of the gunpowder was manufactured in this country by one Mark Fossett, and sold by him to the house of Josling, Allen, and Freireira, and to the plaintiff. Mark Fossett, who usually applied for licences for the exportation of gunpowder manufactured by himself, was employed by Josling, Allen, and Freireira, and the plaintiff, to procure a licence for the exportation of the 400 barrels of gunpowder, to be shipped in the *Venus*, and procured a licence from government, of which the following is a copy: "At the Council-chamber. Whitehall, the 25th January, 1817; present, the Lords of his Majesty's most honourable Privy Council: Whereas, there was this day read at the board the humble petition of Mark Fossett, on behalf of himself and other persons, praying leave to export 500 barrels of gunpowder, from London to Pernambuco, on board the British ship *Venus*, Lawson, master, which petition being taken into consideration, it is hereby ordered in council, that the petitioners be permitted to export the quantity of gunpowder above mentioned, from London to Pernambuco, on board the said ship: provided the merchant exporter do first give security by bond to the proper officers of the customs, with two other able and sufficient sureties (of whom the master of the ship to be one), to be approved of by the said officers of the customs, in six times the value of the gunpowder, to export the same to the place proposed, and none other; and to produce a certificate within eighteen months from the date of the bond from the British consul or vice-consul of Pernambuco, of the gunpowder having been all duly landed at the place; which certificate the commissioners of the customs are required to transmit to the lords commissioners of his Majesty's treasury, in order to be laid before this board. And in failure of the production of such a certificate within the time limited by this order, the bond so entered into to be put in suit, and the right honorable the lords commissioners of his Majesty's treasury are to give the necessary directions herein accordingly. (Signed) James Ruller." On the 29th January a bond for 7,200*l.*, in the common form to his Majesty was executed by the said Mark Fossett, Henry Cooper, and James Lawson, the master of the said ship. The condition was as follows: "Whereas, by an order in council, dated 25th January, 1807, permitting Mark Fossett, on behalf of himself and others, to export 500 barrels of gunpowder to Pernambuco on board the British ship *Venus*, Lawson, master; provided the merchant exporter shall first give security by bond to the proper officers of

the customs, with two other able and sufficient sureties (of whom the master of the ship to be one) to be approved of by the said officers of the customs, in six times the value of the said gunpowder, to export the same to the place proposed, and none other; and to produce a certificate within eighteen months from the date of the bond, from the British consul or vice-consul at Rio Janeiro, of the said gunpowder having been all duly landed at the place; and whereas, the said Mark Fosset this day entered outwards, at the Custom-house, London, on board the above ship *Venus*, James Lawson, for Pernambuco, 400 barrels of gunpowder. Now the condition of this obligation is such, that if all the said gunpowder shall be exported to Pernambuco, and a certificate of the due landing the same at that place produced within eighteen months from the date hereof, from the British consul or vice-consul, then the obligation to be void and of none effect, or else to remain and be in full force and virtue." The above bond was approved of by the proper officers of the customs, and the gunpowder was thereupon allowed to be shipped. The clerk to the person who supplied the bird-shot proved that it was not considered as warlike stores. The goods of the plaintiff being shipped on board the said vessel, were all consigned on his account to Manuel Ribeiro da Silva, at Pernambuco. The ship sailed on the voyage insured on the 4th February, 1817, and was obliged to put into Spithead, where she was detained by contrary winds till the 12th of March, when she again proceeded for Pernambuco. On the 15th April she made the land, eight miles to the northward of Pernambuco, and stood to the southward to make the port; the master hoisted colours, and made the usual signal for a pilot; no pilot came on board, but two Portuguese ships of war were seen standing in for the roads of Pernambuco, and the master of the *Venus* steered towards them to make enquiries respecting the anchorage, being a stranger to the place. When the *Venus* approached the Portuguese ships, one of them fired a shot at her, and sent a boat to board her; an officer and several men from such boat did immediately board her. This officer asked Captain Lawson where he was bound to? and upon his saying to Pernambuco, the officer told him his ship must not go into Pernambuco, but must come to anchor between the ships of war, and desired one of his men to take the helm, who did so accordingly, and she was thereupon brought to anchor between the ships of war. The Portuguese officer then compelled the captain to deliver up all the ship's papers, and to go on board one of the ships of war, called the *Spirito Santo*. The papers were inspected by the officers of that ship, put into a bag, and delivered to the prize-master. The same evening the captain was again sent on board the *Venus*, and the person to whom the ship's papers were delivered, with eight Portuguese sailors, went on board likewise, and took command of the *Venus* as prize-master; eight of her crew were at the same time taken out and sent on board the ships of war. On the following morning, the *Venus*, under the command of the prize-master, sailed for Bahia, a Portuguese settlement, where she arrived on the 21st April. As soon as she was anchored in the bay, several boats containing officers of various descriptions came alongside, and the officers entered and remained on board. On the 23rd April she was removed higher up the harbour, and on the 28th a soldier was put on board as a sentinel, and was relieved night and morning. On the 30th April and 3rd May several custom-house officers and about 30 men seized and carried away from on board the *Venus* the 400 barrels of gunpowder, and conveyed them to the fort at Bahia. The whole of the cargo was removed in the same manner between that day and the 9th May, a sentinel remaining on board till then, when he was withdrawn. Neither the captain nor the mate, nor any of the crew of the *Venus* was ever cited in, or made party to, any judicial proceeding respecting the said goods, or was ever examined as a witness in any court of justice, or upon interrogatories at Bahia or elsewhere respecting the goods. When the captain arrived off Pernambuco, he did not know nor had he received any notice or heard that Pernambuco had been, or declared to be, or was in a state of blockade, and he first heard of such blockade two days after being taken

possession of by the Portuguese ships of war. An insurrection broke out at Pernambuco in February, and was not heard of in London till June. As soon as the plaintiff heard of the ship being seized, viz. on the 26th June, 1817, he gave notice of abandonment to the defendant and the other underwriters on the policy. The case then stated a proclamation of the Prince Regent, dated the 2nd January, 1817, prohibiting the exportation of gunpowder without licence, to certain places therein mentioned, amongst which were the territories of the King of Portugal in America. The case then set out the sentence of a Court, describing itself as a supreme court of judicature at Bahia, stating that it appeared from the proceedings before them, that the English brig *Venus*, being bound to the port of Pernambuco, with a cargo consisting of 400 barrels of gunpowder, and other warlike stores, at a time when the port was under blockade, in consequence of an insurrection of its inhabitants, the said brig was detained, and ordered to be sent into the port of this city, by reason of the 400 barrels of English gunpowder which she was so conveying to a blockaded port, being an article expressly prohibited, and declared to be contraband, by the decree of the 26th February, 1810, and the loaders and owners of such article being consequently comprehended and included in the penalties imposed by the letters patent of the 26th January, 1785, against all dealers in contraband articles. The decree then proceeded to condemn the gunpowder.

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Per Cur. The question in this case is, whether we can consider Mark Fossett as the exporter of this gunpowder, within the meaning of the licence? It appears that he was the manufacturer of the gunpowder, and that he sold it to the plaintiff. It appears also from the affidavit accompanying the petition upon which the licence was granted that he was to ship it free on board; having done that, he then ceased to have any further interest in the adventure. The shipment having been made, the goods were the property, and under the control of the present plaintiff; he, therefore, was the merchant exporter, and ought to have given the security required by the licence. We have arrived at this conclusion with great reluctance, because it appears that in this case there was no intention to violate the law, and that this was the usual mode of carrying on the trade. We, however, feel ourselves obliged to say, that the terms of the licence have not been complied with; the consequence of which is, that the plaintiff cannot recover, and that there must be judgment of nonsuit.

10. GREGSON v. GILBERT. E. T. 1782. K. B. Cited Park on Insurance, 83

S. P. TATHAM v. HODGSON. E. T. 1796. K. B. 6 T. R. 656.

Formerly
slaves were
insurable.*

Per Cur. The act prohibits the owners recovering on account of the mortality of slaves by natural death, but it is argued, that if a captain will take a number of slaves disproportioned to the quantity of provisions on board, in

* But now, by the 5 Geo. 4. c. 113. any person who shall knowingly and wilfully insure or contract for the insurance of any slaves, or any property or other subject matter engaged or employed in accomplishing any of the objects, or contracts in relation to the objects declared unlawful by the act, is declared guilty of felony and liable to a term not exceeding fourteen years' transportation, or to imprisonment and hard labor for a term not greater than five nor less than three years, at the discretion of the Court; 5 Geo. 4. c. 119. s. 10; and see 47 Geo. 3. sess. 1. c. 36; 31 Geo. 3. c. 23; 58 Geo. 3. c. 25. A vessel fitted out for the illegal purpose, with every thing belonging to it, and the goods of the owner on board, are forfeited and liable to seizure: s. 4. Before the abolition of this degraded traffic, the humanity of the legislature had induced them to pass various acts of parliament for preventing underwriters from indemnifying the insured against some particular losses. Thus, by the 30 Geo. 3. c. 58., no cargo of slaves could be insured against any loss or damage, except the perils of the sea, piracy, insurrection, or capture by the King's enemies, barratry of the master and crew, and destruction by fire, 30 Geo. 3. c. 33. s. 8; 31 Geo. 3. c. 44. now expired, nor could the insured recover for a loss or damage on account of the mortality of slaves by natural death of ill-treatment &c.; same statute. It appears, however, that before the acts of abolition insurances on slaves were tolerated, and in the late case a foreigner who was not prohibited from carrying on the slave trade by the laws of his own country was held entitled to recover damages for the wrongful seizure of a cargo of slaves on board of a ship then employed by him to carry on the African slave trade: *Madrago v. Willis*, 3 Barn. & Ald. 353; vide 58 Geo. 3. c. 36. sed quere. The plaintiff in this case was a subject of

consequence of which they die, the owners shall, notwithstanding, recover. That would repeal the act of parliament, which meant that every person going on the voyage should find his interest combined with his duty, and that he should take all possible care that the slaves should be well fed. A captain who knows the possible length of the voyage does not discharge his duty if he take an insufficient quantity of provisions. We are clearly of opinion that the plaintiff cannot call on the underwriters to make good this part of the loss.

11. *WEBSTER v. DE TASTE*. H. T. 1797. K. B. 7 T. R. 157.

The plaintiff having been hired to go as a mate in a ship from the coast of Africa to the Havannah, for which he was to receive wages at the rate of 5*l.* per month, and three privilege slaves, free of expense, on the ship arriving at the port of sale, directed the defendant, who was his agent at Liverpool, to get an insurance on his privilege, and for the defendant's neglect the plaintiff brought this action on the case against him. It appeared at the trial, that the ship was lost on the voyage, and that the plaintiff thereby sustained a loss of 150*l.*, reckoning 39*l.* 5*s.* for his chest and clothes, and the rest for the value of the slaves. It was objected, on behalf of the defendant, that the plaintiff could not recover the value of the slaves, because they were not the legal subjects of insurance, they being in the nature of seamen's wages. That point was reserved for the opinion of this Court, a verdict being taken for the plaintiff for 150*l.*, with liberty to the defendant to move to reduce the damages to 39*l.* 5*s.* The Court were clearly of opinion, that the slaves were not the subject of insurance, and that the plaintiff could not recover in this action more than he could have recovered in an action against the underwriters. They therefore made the rule absolute to reduce the damages to 39*l.* 5*s.*

12. *KING v. GLOVER*. T. T. 1806. C. P. 2 N. R. 206.

The plaintiff, as widow and representative of her husband, Capt. C. King, who commanded the ship John, employed in the slave trade, commenced an action for the recovery of a loss upon a policy of insurance effected by her husband on his commission, privileges, &c. as may be hereafter valued. The insurance was at and from Liverpool to the coast of Africa and African islands, and at and from thence to all ports and places of touching, discharge, sale, and final destination in the British and foreign West Indies, the Bahama, and America, all or either, with liberty to exchange slaves and goods with any other vessel or vessels. The plaintiff having obtained a verdict on this policy, a rule was granted to the defendant in the ensuing term, calling on the plaintiff to show cause why that verdict should not be set aside, and a nonsuit or a new trial be had. It was contended, that the captain's commission and privileges were not wages, but something in addition to wages; and, consequently, that such a remuneration to him for his extra trouble and attention in the management and disposal of the slaves, was a good subject of insurance; they objected that he acted in the double capacity of captain and supercargo, for the former of which employments he received wages, for the latter this additional compensation; and that whatever doubt might be entertained as to his being allowed to insure in one character, there could be none as to his being entitled to insure in the other.

Per Cur. If, during the voyage, all the slaves were to die, the captain would wholly lose his commission and privileges, and would not be entitled to recover any thing from the underwriters; if the policy were upon the health of the slaves, we think there would be considerable force in the objections last made. But this is a policy against the perils of the sea only, which is in answer to the objection. When the case of *Webster v. De Taste*, 7 T. R. 157, was cited, it did not occur to us that there was any difference in the rule of

the King of Spain, which country had not consented to the abolition of the trade in that part of the world where the transaction occurred. It remains to be noticed, that where slavery prevails, it must be founded on the authority of some positive or municipal law, and that the bondage ceases when the slave departs from the limits of the country by which that condition was created; *Forbes v. Cochrane*, 2 B. & C. 443; 3 D. & R. 679. S: C.

* Because the interest is contingent and not vested; see *Magens*, 19.

[64]
No insurance can be effected on seamen's wages, or on a perquisite in the nature of such wages.

holds as to the captain, who may insure the commission privileges, &c.

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the law as applied to the captain of a ship and the mariners. But upon considering the two cases, both upon principle and in practice, there does appear to be a most material difference; and indeed the chief pay of captains, in many trades, as for instance, the East India trade, being the privilege of carrying out investments to the settlement to which they are bound, and their making the best advantage of them in their power; it would be absurd to say that such investments were not the subject of a legal insurance; our brother Marshall, in his book, when treating this subject, does not seem to have imagined that the prohibition as to insurance of wages extended to the captain as well as the seamen; for he commences his observations by these words, "To prevent the desertion of seamen." So the 8 Geo. 1. c. 27. was passed to prevent masters paying seamen above one moiety of their wages due to them beyond the seas. Indeed, the regulation is founded altogether on the marine law, which does not allow the mariners any wages, unless the ship earn freight, and which law would be completely evaded if the mariners could insure their wages. Considering, therefore, that a clear distinction exists in law with respect to the insurance of wages between the captain and the mariners, it is not necessary to discuss the effect which would result from the facts of this case, as establishing the captain to have acted in the double character of captain and supercargo.

But no insurance can be effected on money lent to the captain of a ship, payable out of the freight.

13. *WILSON v. ROYAL EXCHANGE*. H. T. 1811. N. P. 2 Campb. 326.

Action on a policy of insurance. The plaintiff also declared upon another policy on 300*l*. lent to the captain, payable out of the freight. But Lord Ellenborough held, that this was not an insurable interest; and, the policy being illegal on the face of it, that the premium could not be recovered back.

14. *LUREN v. CRAWFORD*. H. T. 1802. C. P. 3 B & P. 75.

Freight is the subject of insurance; [66]

Per Cur. It would be a strange thing if freight could not be the subject of protection by an instrument which had its origin from commerce, and was introduced for the very purpose of giving security to mercantile transactions. It is a solid substantial interest ascertained by contract, and arising from labour and capital employed for the purposes of commerce; but even in this case, the existence of a subject out of which freight may arise or be earned is necessary, as is settled by the case of *Tonge v. Watts*, lately cited and approved of by Lord Kenyon, in the case of *Thompson v. Taylor*. The insurance of profits, ascertained by positive contract, may be equally just and reasonable, and is hardly to be distinguished in principle from the case of freight.

15. *BARCLAY v. COUSINS*. T. T. 1802. K. B. 2 East, 551.

And it is no objection that the thing insured has not physical existence;

On the question whether the profits of a cargo employed in trade on the coast of Africa are an insurable interest?

Per Cur. The question is, if on an insurance made on the profits to arise from such cargo, the plaintiff can recover? An insurance is contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages which, but for the perils insured against, the assured would not suffer; and in every maritime adventure the adventurer is liable to be deprived, not only of the thing immediately subjected to the perils insured against, but also of the advantages to arise from the arrival of those things at their destined port; if they do not arrive, his loss in such case is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain without more risk than the capital itself would be liable to; and if when the capital is subject to the risks of maritime commerce, it be allowable for the merchant to protect them by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks? It is surely not an improper encouragement of trade to provide that merchants, in case of adverse fortune, should not only not lose the principal adventure, but that that principal should not in consequence of such bad fortune be totally unproductive, and that men of small fortunes should be encouraged to engage in commerce by their having the means

of preserving their capitals entire, which would continually be lessened by the ordinary expenses of living if there were no means of replacing that expenditure in case the returns of their adventure should fail. Where a capital is employed subject to such risks in case of loss, the party is a sufferer by not having used his money in a way which might, with a moral certainty, have made a return not only of his principal, but of profit; and it is but playing with words to say, that in such case there is no loss, because there is no possession, and that it is but a disappointment. Foreign writers upon insurance, whose doctrines form the greatest part of our law on this subject, certainly do not treat of insurance on profits as a matter inconsistent with the true nature and design of such a contract; and where it is spoken of by them as a species of insurance which cannot be made, this latter doctrine will be found to be referable to the positive institutions of different nations, who have thought it wise to prohibit it. So that it seems the insurance of profits is so far from being inconsistent with the nature of insurance, that *contra* Santerna thinks it necessary to show by argument that the profit is not to be considered in all cases, and that where the assurance is made *simpliciter*, then *lucrum non spectatur*. And Stracca, another Italian lawyer, agrees with Santerna in his Gloss. No. 6. In France such assurances were unlawful, but that depends, according to Valin, on the ordinance of the marine, which also forbids insurance upon freight; and the reason given by Valin for making these ordinances with respect to the one and the other is the same; so in Holland it appears from Bynkershek's *Questiones Juris Privatii*, book iv. c. 5., that such insurances cannot be legally made there; but that is by the positive laws of that country; notwithstanding which the practice has so generally obtained to insure expected profits, as that, in a case he there states, the majority of the judges of the court where the question arose determined in favour of the assured, and those who opposed that decision rested their opinions on the positive laws of the country, and not on such contracts being contrary to the nature of insurance. In this country there is no law forbidding such insurance, unless it could be shown that the insurer had no interest in the profits, or that from its nature it must be a mere wager, so as to bring the case within the statute 19 Geo. 2; and that they are not considered as contracts inconsistent with the general nature of insurance is proved by the instance put of an insurance on freight, which, as was very truly argued at the bar, differs only from the case now before us in the same degree as a return of capital vested in shipping differs from a return of capital vested in merchandize; and by the cases of *Grant v. Parkinson*, in Marshall, 111, and Park 267. which was insurance on the profits of a cargo of molasses, and the case of *Hensickson and Margetson*, Mich. 1776. The authority of *Grant v. Parkinson*, as applied to this case, has been attempted to be gotten rid of by observing that the thing insured there was the profit of a specific cargo; but in that respect the two cases do not differ, for this is an insurance on a specific cargo; and we have no ground to say that the profits of a cargo to be exchanged in the African trade, from which exchange the profits will arise, are not, to use the expression of Lord Mansfield in *Grant v. Parkinson*, pretty certain, admitting for the sake of argument, which it is not necessary for us now to determine, that in some mercantile adventures there may be a portion thereof, without the policy being a *wagering contract*. This, however, we cannot presume of the returns to be made from an adventure undertaken according to a long established course of trade like that in question, in which numbers have been engaged to great advantage for a continued succession of years.

16. *CRAWFORD v. HUNTER*. E. T. 1800. K. B. 8 T. R. 13. In Error in Exchequer. 3 B. & P. 75. In Error, Dom. Proc. 2 N. R. 269.

In this case the property insured consisted of Dutch vessels, seized at sea by British ships of war under instructions from the Admiralty, to take all ships and cargoes belonging to the subjects of the United provinces, and to bring them into the ports of this country till the political aspect of the provinces should determine whether they were to be regarded as under the domination of

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But the property insured must be that in which the insurer had an

[68] France, a nation then at war with this country; in such case the property interest. It would belong to his majesty; or whether they were to be regarded as standing in a relation of amity towards Great Britain in which case the property would be restored to the Dutch owners, and the commissioners by whom the insurance was effected had been appointed by the crown in conformity with the provisions of an act of parliament, to take into their possession and care all such ships and cargoes belonging to subjects of the United Provinces as should be brought into the ports of this kingdom, and to manage and dispose of the same according to such instructions as they should from time to time receive from his Majesty and the Privy Council. The Courts of King's Bench and Exchequer Chamber, as well as a majority of the learned judges to whom the question was submitted in the House of Lords, declared that their opinions that the commissioners had an insurable interest. But Mr. Justice Chambers and Lawrence dissented. Id. Eldon also appears to have been of opinion that the interest of the commissioners in this case was not sufficient to support an insurance. The arguments in favour of the insurability of the interest were, that the commissioners might be considered a parliamentary trustees, consignees, or prize agents, with respect to this property, in either of which capacities they might insure it; that the design and the effect of the commission, as well as of the statute on which it was grounded, were to give the commissioners the same power as the owners themselves might have exercised if they had remained in possession of the property; that a vested interest was not necessary to give a right to insure; that an expectancy of interest, coupled with a present existing title, was sufficient; that although the powers of the commissioners might be revocable, or their interests contingent, or incapable from their nature of any right of abandonment; or, although other persons might have insured the property to its full value, yet no substantial objection could be made to the insurance on any of these grounds. The arguments against the insurability of the interest were, that the commissioners could not be considered as possessing any right in the legal sense of that word, either absolute or contingent, either in possession, reversion or expectancy; that they did not stand in the situation of trustees, if by the term trustee be understood one who has some existing right to the thing insured for the benefit of others; that, considering the commissioners as consignees, they were merely naked consignees or agents, and; therefore, should have averred the interest to be in their employers; that neither the crown nor the commissioners could have the property in the vessels and their cargoes, as against the foreign owners, without a condemnation in the Admiralty Court, which did not appear to have taken place; that the commissioners had no property, nor any derivable out of a contract concerning the property, but a mere power or faculty (as it was described), or right of future concern and management. The question, however, concerning the insurability of the interest of the commissioners was not finally decided in the House of Lords; for one of the vessels, the *Zeeleye*, in respect of which, as well as of the other property detained, the damages were assessed on the trial in the Court of King's Bench, had been lost at sea, after the declaration of war between this country and the United Provinces; and, upon that account, was not comprehended in the terms of the commission as property which the commissioners were authorised to take into their care and management, but was vested in the crown *jure belli*. The House of Lords awarded a *venire facias de novo*, in pursuance of which writ the cause was carried down again; and upon the trial, before Lord Ellenborough, C. J., the verdict was taken, not in respect of the interest of the commissioners, but upon the Court alleging the interest to be in his Majesty; and Lord Ellenborough's direction, concerning the sufficiency of this interest, was affirmed in Dom. Proc. on a bill of exceptions, with the approbation of all the judges.

17. ROBERTSON V. HAMILTON. M. T. 1811. K. B. 14 East, 622.

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The ship *Ross*, belonging to the plaintiffs, and the ship *Atlantic* (on which this question arose) to Fisher and Co., and the cargoes to other persons, were insured on a former voyage, and captured by the Spaniards, and carried into

Spain; and the underwriters upon the Atlantic, of whom the defendant was one, paid as for a total loss. But while proceedings for condemnation were pending in the Prize Court in Spain, Cawan (residing there) having been severally empowered by the different owners to claim restitution, and to enter into compromise with the captors for giving up part of the cargoes on the restoration of the remainder and of the ships, and to defray all costs and charges thereon, and to forward the ships and goods restored to London, and to pay all demands on the ships and goods, agreed with the captors subsequent to the cessation of hostilities (and the captures and subsequent peace were held in the Court of Admiralty here to bind the property captured), that upon giving up to them part of each cargo, the rest and the ships should be restored for the common benefit of the original owners of both ships and cargoes in the lump. On which Cawan advised the plaintiffs that he should consign the Atlantic to them, with their own ship, the *Ross*, and draw bills on them (which were afterwards accepted and paid), for the general expenses of effecting the arrangement with the captors and for the outfit of both ships, and referred to this information to guide them with respect to insurance. On which the plaintiff insured the Atlantic by a policy on ship or on salvage charges, or on any interest as may be hereafter declared by the assured; and after a subsequent capture of her by the French, declared against the defendant (who had also underwritten this second policy), and averred the interest to be first, in themselves; and secondly, in Fisher and Co., the original owners of the ship Atlantic. And held that the plaintiff had an insurable interest, as well on account of the whole property captured (of which they owned the other ship, *Ross*), having been restored at the sacrifice of part of the cargoes for the common benefit of all, which created in them a hotchpot interest in the ship Atlantic; and also as representing Cowan, who was empowered to act as attorney for all the original owners, and to whom such restitution in hotchpot was made for their common benefit, and who had incurred charges and drawn bills on the plaintiff on account of the common concern, which had been accepted and paid by them; and Cowan having had authority to insure from Fisher and Co., the original owners, under their order, on obtaining restitution, to forward the ship to London, and to pay all claims and demands on her, thought the plaintiffs would be amenable out of the money recovered to the several persons interested, in proportion to their several claims of the property in hotchpot, and amongst others to the defendant himself, as an underwriter on the first policy, upon which he had paid as for a total loss to Fisher and Co.

ture, does not preclude the assured sailing and loading to obtain restitution, who therefore may insure any interest thereby acquired in the subject matter.

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18. *BÖHM V. BELL*. H. T. 1799. K. B. 8 T. R. 154.

On the 30th of January, 1797, captains Brisbane, Durham, and Guion, having taken the ship *Westcapelle* and her cargo as prize, off the Cape of Good Hope, then bound upon a voyage from Batavia to Boston, put her under the command of Lieutenant Macdougall of L'Oiseau, a prize-master, and sent a letter to Messrs. Elphinstone and Jackson, mentioning the capture of the *Westcapelle*, formerly a Dutch East India ship, but then navigated under American colours from Batavia, by the name of *George*, of Boston, manned with a crew above two-thirds Dutch, which they supposed a lawful prize; and stating that as there was no court of Admiralty there, they were under the necessity of sending her to England for trial, and advising an insurance on the ship and cargo of 40,000*l.* from all risk during her passage to England. By the same letter it appeared that the estimated value of the prize was 150,000*l.* Messrs. Elphinstone and Jackson, in consequence of such orders, directed the plaintiff to cause the said ship and cargo to be insured to the extent of 40,000*l.*; and accordingly the plaintiff, on the 22nd of April, 1799, effected a policy upon the ship and goods, at and from the Cape of Good Hope to London, valued at 150,000*l.* being on ship and cargo. This insurance being effected by order and for account of the Hon. W. Elphinstone and J. Jackson, esq. agent for the captors, at a premium of twenty guineas per cent. to return 3*l.* per cent. It departed from the Cape of St. Helena, with a convoy for

So, the captors of prize have an insurable interest.

England, and arrived. The defendant subscribed the policy for 500*l.* and received the premium, being 150*l.* The plaintiffs and Messrs. Elphinstone and Jackson effected other policies on the same ship and cargo, for the homeward risk, to the extent in the whole of 48,000*l.* at the same premium; and after the ship's arrival in the Thames they effected other policies with the public insurance offices against river risks; one at the rate of 10*s.* per cent., another at 15*s.* two others at 1*l.* per cent. premium. The ship, after her capture, sailed with her cargo, under the command of Lieutenant Macdowgal, as prize-master, from the Cape of Good Hope with convoy for St. Helena, where she arrived, and remained in safety for one month. She sailed from thence for England without convoy, and arrived in safety in the Thames on the 7th of August, 1797. The ship and cargo were, at the instance of the captors, libelled as a prize in the usual manner, in the Court of Admiralty, as belonging to subjects of Holland, enemies of the King of Great Britain; but on the 30th of August, 1797, a claim was there made and entered by W. Burgess, on behalf of Theodore Layman, George Williams, and Company, and Samuel Gardner, all of Boston, in the state of Massachusetts, and Clifford Crowninshield, the master, and Henry Smith, and Messrs. Brown and Francis, of Providence County, in the State of Rhode Island and Providence Plantations, merchants, and respectively citizens of America, as the true and lawful owners and proprietors of the ship Westcapelle and cargo; also, on behalf of the officers and crew of the ship, and of Jonathan Dennison, for his private property. Sentence was pronounced thereupon: "The judge having heard further informations, and advocates and proctors on both sides thereon, at the petition of Stade, admitted the claim for the ship and cargo (except such part thereof as is claimed as the property of Huibright Maarhys, the chief mate), and by interlocutory decree pronounced the said ship and cargo (except as aforesaid) to have belonged as claimed, and decreed the same to be restored to the claimant for the use of the owners and proprietors thereof; and by further interlocutory decree, pronounced the goods claimed on behalf of H. Maarhys to have belonged, at the time of the capture and seizure thereof, to an enemy of the crown of Great Britain, and as such or otherwise subject and liable to confiscation, and condemned the same as good and lawful prize, taken by his Majesty's ship of war L'Oiseau, C. Brisbane, commander, in company with his Majesty's ship of war Vindictive, D. O. Guion, commander, and Saldanha, W. Durham, commander; and rejected Stade's prayer, as to reserving the consideration of damages subsequent to the capture. The ship and cargo have been since restored to the claimants, and have been sold by them, the former producing about 1,500*l.* and the latter about 60,000*l.* The goods of H. Maarhys, condemned by the sentence, have been since also sold by the proper officer of the Court of Admiralty, and, after deducting the expenses of sale, have produced the sum of 1,014*l.*, the invoice price thereof being about 300*l.* No fraud is imputable either to the plaintiff or to the captors of the ship and cargo respecting the insurance in question." On the first of November, 1798, the plaintiffs demanded from the defendant and other underwriters 18*l.* 19*s.* 10*d.* per cent. as a return of the proportion of the premium paid by the plaintiffs to the defendant upon the policy, in respect of the ship and such part of the cargo as has been decreed to be restored by the above sentence; and for this demand the present action is brought.

Per Cur. This is a claim by the plaintiffs for a return of premium; on the ground that the assured had no insurable interest in the property; but it would be opening a source of infinite litigation if we were to decide that this action could be maintained, and that a portion of the premium ought to be returned, in the event of its appearing that the assured had not an interest up to the extent of the insurance. Three answers have been given to this case by the defendant's counsel; of the two last we shall only say, that they are important, and will deserve much consideration when it becomes necessary to decide on them; but here it is not necessary to give an opinion upon either of them. With regard to the first, it seems to me that the whole difficulty has arisen

from confounding an absolute indefeasible interest with an insurable interest. It is not pretended that the assured had the absolute property in the subject of insurance; neither need they have such property to make the policy legal; it is sufficient if they had an insurable interest; and according to what was said by Lord Mansfield, in the case of *Le Cras v. Hughes*, they certainly had an insurable interest. If they had succeeded in the Court of Admiralty, it will be admitted that they had an insurable interest; and in case of their not succeeding there, there were events in which they might be made answerable, and against which it was competent to them to insure. We are, therefore, satisfied that they had an insurable interest in the subject insured; and this is a full answer to the present action. [72]

19. *STIRLING v. VAUGHAN*. M. T. 1809. K. B. 11 East, 619.

This was an action on a policy of insurance effected by the plaintiffs, as agents, upon a ship called the *Prize*, No. 3, and her cargo, from Monte Video to London. The subject of insurance was a prize taken from the Spaniards by the conjoint forces of the army and navy upon the expedition to the river Plata; and the interest was averred by the first count to be in the King, by the second to be in the captors, and the third count, without averring any interest, alleged that it was not in his Majesty or in any of his subjects; the loss was alleged to be by the perils of the sea on the voyage home. At the trial, it appeared, that Admiral Murray was called as a witness, to show on whose account the insurance was effected; and he deposed that after the capture of this and other prizes by the conjoint forces employed on the expedition, a Mr. Blacker was appointed prize-agent for ships, by the naval and military commanders, to act on behalf of all interested in the capture, and from him orders were received at home to insure every thing in which the captors were interested; but it does not appear that Blacker had received any appointment or direction from the Treasury, or any other department of government, authorizing him specifically to insure or take care of the interest of the crown, further than as such an authority might by law be inferred from his being appointed as prize-agent by the captors, and the directions received by him from them to act on behalf of all interested in the capture; neither was there any evidence of the King's having repudiated such an authority. The prize was lost by the perils of the sea on her voyage homewards, and before any condemnation of her in the Court of Admiralty. Under these circumstances, Lord Ellenborough, C. J., left it to the jury to infer an authority from the crown to the captors, to cause insurance to be made, or an adoption of it when made on behalf of its interest in the prize, in which the captors themselves had at least an eventual interest; and considering that the plaintiffs were entitled to recover either on the first or second count, though he relied principally at the time upon the former, his lordship advised the jury to find a verdict for the plaintiffs, which they did accordingly.

Per Cur. The interest is first averred to be in the King; and secondly in the captors. The verdict is generally for the plaintiffs; and it does not appear to me to be material, for the purpose of disposing of the rule for a new trial, to consider how far the verdict might be supported upon the first count; because it may certainly be supported on the second, which avers the interest to be in the captors. The case has been argued, first, as if this had been a naval capture solely; and next upon the stat. 42 Geo. 3., as a capture by the navy and army conjointly. But though the terms of this act, and of the former act for the distribution of the naval capture, be somewhat different, yet there is no material variation in the meaning of them; the latter statute meant to give the property of the prize to the joint captors, in the same manner as the former statute had done to the naval captors, subject only to an appropriation by the crown of the respective portions, but reserving no part of the property to the crown itself; so that now the joint military and naval captors have as much a vested interest in the prize as the sole naval captors had before. The question then is, whether that interest be insurable? Now it never was contended that an absolute indefeasible vested interest in the subject

Even the King may release before condemnation.

matter was the only interest insurable. The case of a consignee of goods is decisive to the contrary; and in the case of *Wolfe v. Horncastle*, not the original consignee, but one who agreed, on the refusal of the other, to take the cargo, and who accepted a bill drawn by the consignor, was held to have an insurable interest in the cargo to the extent of his acceptance. Is this, then, a mere expectation? We cannot consider that to be a mere expectation which is a right vested by act of parliament, no longer subject to the absolute will of the crown, but only subject to its power of releasing to the captors before condemnation. It seems to us that the captors under this act of parliament, have a better right to insure in respect of their interest in the prize than the consignee in the case of *Wolf v. Horncastle*; they had the absolute possession of the property, and their right to retain it was only subject to the release of the property by the crown to the original owners before condemnation.

20. *ROUTH v. THOMPSON*. T. T. 1809. K. B. 11 East, 428.

But where a Danish ship was taken by one of our cruisers after the issuing of an order in council to detain and bring into port all vessels of that nation, but at a time when no war existed between this country and Denmark, the captors were held to have no insurable interest; This was an action on a policy of insurance upon a ship and freight from Lisbon to London. The ship was a Dane, had been seized as such after his Majesty's proclamation of 2nd September, 1807, by his Majesty's armed ship, the *Duchess of Bedford*, had received some repairs at Lisbon, and had taken in a cargo there for London. In one count the interest is averred to be in his Majesty, and the insurance is stated to have been on his account; and in another the interest is averred to be in the commander, officers, and crew of the *Duchess of Bedford*, and the insurance is stated to have been on their account. The case expressly stated that the policy was effected on account of the captors.

Per Cur. That statement precludes us from considering it as effected on account of the crown. Had there been no such specific statement, it might have been open to us to consider whether the policy were not referable to the interest of the crown; but after a distinct statement that it was effected (not on behalf of the crown but) on account of the captors, it must be referred wholly to them, and the plaintiffs must recover or fail according as they have or have not a right to aver an interest in themselves. This brings us to the question whether they had an insurable interest. Their right in this respect has been put upon two grounds; 1st. That they had a well-grounded expectation, warranted by the practice of the crown in similar cases, that the ship and freight, had there been no loss, would have been granted to them; and 2ndly. That they had the lawful possession, and were liable either to the crown or the foreign owner, for the safe custody of the vessel; and that on either of these grounds they were warranted in insuring on their own account. As to the first, it is material to see in what situation the captors stood: it is clear they had no vested right; they could demand nothing of the crown. Had the crown made the grant in their favour, it would have been altogether *ex gratia*, a mere boon and gift. That gift might have been of the whole, or it might have been of part, and of a very inconsiderable part only. The bounty of the crown would probably have been proportioned to the merit of the detention and capture, and the value of the prize. Had any considerable danger attended the performance of these services, the grant would probably have extended to the whole; had there been no danger or difficulty in them, the grant would probably have been smaller; and had it appeared that the seizure had been made upon speculation only, without any knowledge of the proclamation, there probably would have been no grant at all. At any rate, however, if there were a grant, it would be mere bounty; and has a man a right to indemnity because he has lost the chance of receiving a gift? Had the ship arrived in safety, the captors would have had the chance of a grant from the crown; but can they in respect of that chance insure the ship's arrival? To what extent could they insure? Not to the whole value, because the grant might only have been of part, nor to any given part, because it must have been uncertain what part, if any, would have been granted. The utmost extent is the value of the chance, and how is that to be estimated? Is application to be made to the crown to know what it would have granted if the ship had arrived? And what

is to be the case if the answer be, as it probably would be, that the crown never has considered nor has occasion to consider that point? Independently however, of the difficulty of fixing the value, and supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest be so described in the policy? Can a man who has no right, legal or equitable, either in ship or freight, effect an insurance, either merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety? The declaration must aver an interest in the subject insured, and that interest must be proved; and how can it be said that these captors have any interest, either in this ship or freight, when the ship is altogether the King's, the freight is altogether the King's, and the captors have no interest in either, nor any concern in respect to the same, beyond a mere chance that the King may be induced to give them something out of the produce of such ship and freight? In *Leenas v. Hughes*, which was cited in the argument, part of the captors at least, viz. the seamen, were considered as having a vested right in the ship and cargo, as prize, to a certain extent; and the Court decided that the captors had therefore a right vested by the act. As to the second ground, that the captors had the lawful possession, and were responsible either to the crown or to the Danish owners for the safe custody of the vessel; is this a true representation of their situation? They certainly had the lawful possession; but were they responsible for the ship's safety, unless as far as that safety might be endangered by any wrongful acts of their lawful possession? The subsequent declaration of hostilities put an end to any claim by the Danish owners, and of course to all responsibility of the captors in respect to them. It then became their duty to act for the best, with a view to the safety of the ship, and the mere interest of the crown therein. They were bound to leave Lisbon; it was for the interest of the crown that they should make the ship instrumental in withdrawing from Lisbon as much property as she could properly carry; they acted, therefore, for the best, and were consequently justified in respect to the crown in what they did. The crown cannot call upon them for damages, and they have no right to ask for a sum as an indemnity when they have not been, and (under the circumstances stated) could not have been damaged. The consequence is that the plaintiffs have no right to recover upon the policy. [75]

21. *NORTH v. THOMPSON*. H. T. 1811. K. B. 13 East, 274.

Action on a policy of insurance. After an order made by the King in Council on the 2nd, and gazetted on the 5th of September, 1807, to detain and bring into port all Danish vessels, a hired armed ship of his Majesty took off Lisbon on the 10th, and carried in thither a Danish vessel; and, without instituting any proceeding in the Admiralty Court there, though Portugal was an ally with England in the war, sold her cargo to defray the expence of repairs, and took in a loading on freight for London, with which she sailed on the 3rd of November, on which day hostilities were declared against Denmark by another order of council; and on the 12th November, an insurance was made by order of the prize agent appointed by the captors, in consequence of a letter written by him in October, before the declaration of hostilities, directing the plaintiff to insure "for my account the Danish vessel Knud, Tenkelson, which has been detained by his Majesty's armed ship, Duchess of Bedford, and for which I am authorized to act as agent," and concluding with expressing the agent's confidence that the plaintiff would do the best for the interest of the concerned. And after such insurance was effected, the King by another order of council, reciting the circumstances, adopted the insurance. The Court held, that his Majesty, having a lawful possession of the captured vessel through the act of his officers and servants, whose possession was legalized by the previous order to detain Danish vessels, whether known to them or not at the time of the capture, had an insurable interest therein; and that it was competent for him to adopt the insurance made by order of the agent appointed by the captors, whose letter or instructions to insure for his account was sent in his general character of agent for the capturing ship, and *Aliter, if the insurer had been the King.*

permitted by the terms of it an insurance to be effected for the benefit of any who might ultimately appear to be interested, and none other but his Majesty having an interest in the vessel seized before the declaration of hostilities, and order for reprisals.

22. CAMDEN V. ANDERSON. T. T. 1794. K. B. 5 T. R. 709.

To make the subject matter of the ship insurable, she must be duly registered;

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There were three plaintiffs on the record, Camden, Calvert, and King, in whose names the policy was effected; and the declaration consisted of two counts, the first of which averred the interest to be in the plaintiffs, and the second averred it to be in the plaintiffs and one T. Curtis. It was proved on the part of the plaintiffs, that the ship in question, the freight of which was the subject of the insurance, had been paid for by the four persons named in the last count, who were in partnership. In answer to which the defendants produced a register made in 1786, in pursuance of the 26 Geo. 3. c. 60. wherein the ship was registered in the names of Camden and Calvert only, and it was insisted that, as the plaintiffs' title to freight arose only from their ownership, the register was decisive evidence that no other persons than those two were interested in the property; and as no account in the declaration stated the interest to be in the two only, the plaintiffs took a verdict, with liberty to the defendant to move to enter a nonsuit. *Per Cur.* The words in Lord Hawkesbury's act respecting the transfer of ships are, that every bill of sale in which the certificate of the registry of the ship is not truly recited, shall be utterly null and void to all intents and purposes. It is admitted, that the plaintiffs have not complied with the requisitions of this statute, and therefore the transfer to them is null and void to all purposes. And as this is an action for freight, which can only be maintained in consequence of ownership, the plaintiffs are not entitled to recover, because it appears that they have no title to the ship.

23. RITCHIN V. ST. BARBE. E. T. 1813. C. P. 4 Taunt. 768.

And where there is a change of possession, the venditor's interest was held to be correctly stated as continuing till the time when the registration was completed, and the vendee's commencing at that time.

The plaintiff averred, that he was at the time of effecting the insurance, and from thence until the 19th day of December, 1810, interested in the said ship to the amount of all the money insured thereon: and that he, the plaintiff, together with one Edmund Maude, were then and there, to wit, on the day last aforesaid, and from thence until, and at the time of the loss, interested to the like amount; the loss was proved by a condemnation under the American non-intercourse act. As to the interest, the evidence was, that on the 7th day of December, 1810, the plaintiff, who before that day had been the sole owner, executed a bill of sale of a certain proportion of the ship *Little Sally*, then at sea, to E. Maude, but that the registration was not completed until the 19th of that month. For the defendant it was objected, that the allegation was not proved that the plaintiff was solely interested from the 11th until the 19th of December; for that after the registration was completed, the title of Maude had relation back to the day of executing the bill of sale, and that the plaintiff must therefore be nonsuited. The jury, however, found a verdict for the plaintiff. *Per Cur.* There is an authority in the Court of King's Bench, *Moss v. Charnock*, 2 East, 392; that there is no title in a purchaser till the documents are completed. There is a case, *Hubbard v. Johnstone*, 3 Taunt. 209, in which our brother, Wood, B., has thrown out a doubt upon the propriety of that decision; but upon a strict technical objection, such as this is, we should not be inclined to let in that objection now, when the merits were on the other side.

24. WOLF V. HONCASTLE. M. T. 1798. C. P. 1 B. & P. 316.

So, a debt which arises in consequence of a consignment, and

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A. having consigned a cargo to B., transmitted the bills of lading to C., i. e. A.'s general agent, with directions to deliver them to B., in order that B. might insure the cargo; shortly afterwards A. drew a bill of exchange on B. for the amount of the cargo in favour of C., and remitted the same to C. to procure acceptance; B. refused to accept the bill of exchange, and returned the bills of lading to C., who thereupon caused an insurance to be effected on the cargo in his own name; and, having informed A. of what he had done, A. approved of it. A loss happened. In an action on the policy, it was averred in the declaration that the interest was in A., and that such a person may insure for

the benefit of the consignor. *Per Cur.* It should be alleged in the declaration that the insurance was on the consignor's account and state the special circumstance attending the title, instead of alleging generally that he himself was interested to the full amount; 2 N. Rep. 326; see *Coxe v. Harden*; 4 East, 211; 1 Campb. 309; 3 B. & A. 277. When a consignment is made, it is most usually, indeed, almost necessarily, accompanied by a bill of lading, *Meyer v. Sharpe*; 5 Taunt. 34; 80 ib. 558; *Davis v. Reynolds*; 4 Campb. 326; which is a material document for the purpose of demonstrating in whom the interest is vested.

25. *HIBBERT v. CARTER.* E. T. 1787. K. B. 1 T. R. 175; S. C. 1 H. Bl. 368.

The plaintiffs were merchants in London, and the general consignees of And where Kerr, who was a planter in the island of Jamaica. They were in the constant the ship habit of procuring insurance upon his goods as soon as they received advice ment is of their being shipped. On the 23d of December, 1782, the plaintiff received made for advice from Kerr of his having shipped ten hogsheads of sugar on board the account the Devonshire, in which letter, dated the 18th of October, 1782, was con- and at the tained a general direction to insure whatever goods were shipped by him. the risk of the consignor, The insurance was immediately effected; but in the month of November, be- and the net tween the time when the order was sent and the time when the defendant sub- proceeds are assigned scribed the policy, Kerr had inclosed the bill of lading to one Dellprat in to the con- Jamaica, to whom there was an arrear of interest due upon mortgage on Kerr's signee in estate in that island. The plaintiffs had notice of this indorsement after the case of the insurance was made by a letter from Kerr to them, wherein he informed them arrival of that he had been obliged to assign the bills of lading for the net proceeds to the goods, Dellprat. The bill of lading, as it originally stood, expressed the sugars to be the consign- shipped on account and risk of the shipper, and directed the delivery to his or is entit- order or that of his assigns; the indorsement was in the following terms: "De- tled to in- scribe. liver the above sugars to Mr. John Hodgson, for account of S. Dellprat.— (Signed) Robert Kerr." The ship was lost in the course of the voyage.— The plaintiffs rested their case here, and contended, that upon these facts they were entitled to a verdict for the amount of the insurance. On the other [78] hand it was objected, that Kerr having assigned the bill of lading before the insurance was actually effected, the averment in the declaration, that these sugars had been insured on his account, was not true, for he had not then any insurable interest remaining in him, the entire property in the goods having passed out of him by the assignment of the bill of lading, which operated in this instance as a payment. And Buller, J., being of this opinion, upon the general ground, that the indorsement of a bill of lading passed the whole property, would have nonsuited the plaintiffs; but it appearing that the defendant had neglected to pay the premium of twenty guineas into court, the plaintiffs took a verdict for that sum. The Court, however, upon this occasion were all clearly of opinion that, where a bill of lading is taken by a creditor as a security for his debt on his own account, the whole property passes by the delivery, and is to be considered as a satisfaction of the debt *pro tanto*; that the parties were always at liberty to vary from the general rule, by entering into any particular agreement between themselves; but that it must be shown in order to take advantage of it. They considered the case of *Caldwell v. Ball* as deciding the general question; and as to the case of *Delaney v. Stoddart*, there was an agreement that the policy should be transferred. They therefore refused the rule.

* But with respect to a naked consignee, or a person appointed only for the purpose of doing some act respecting the goods consigned, who had not the legal property in the goods, and is in no degree beneficially interested, it seems that, although C. made the insurance as his agent, and for his use and benefit, and that, at the time of making it C. resided in Great Britain, it was holden that C. fell within the description of persons mentioned in the statute: 1. He might be considered as the consignee, inasmuch as he was the general agent of A., and had in his possession the bills of lading, which had been returned by B., the original consignee. 2. He might be considered as the person who had received the order to insure; for the subsequent approbation of A. was equivalent to a previous order; and, consequently, the policy was well effected in the name of C.

A valued policy on ship and goods by persons who had chartered a vessel, the underwriters agreeing to pay as for a total loss in case the ship should not be allowed to discharge at the port of her destination, is sufficient to support an insurance.

So, a partial payment of freight in advance seems to constitute a sufficient interest, since the loss of the ship and goods must produce a loss to the freighter of the sum advanced.

So where A. the captain of a ship, having insured expenses on her account drew a bill on his owner in payment, with a memorandum, "that if it should not be honoured, the holder would insure the amount, and place the premium, &c. to the ship's and A.'s account."

26. PULLER V. GLOVER. H. T. 1810. K. B. 12 East, 124.

The plaintiff having shipped goods on an adventure to St. Petersburg, on board a vessel chartered for the purpose, made instance on ship and goods in the common printed form in blank; and by a written memorandum in the policy, the underwriters agreed to pay a total loss in case the ship Anne should not be allowed by the Russian government to discharge her cargo at St. Petersburg, on which voyage the vessel had then sailed, chartered by the plaintiffs. The Court held, that the insured were entitled to recover upon this policy, on an allegation that the vessel, on her arrival at St. Petersburg, was not allowed by the Russian government to discharge her cargo, but was obliged to return back with it, by which the value of the cargo was reduced below the amount of the invoice price, together with the charges paid thereon, and the premium of insurance, &c.

27. MANSFIELD V. MAITLAND. T. T. 1821. K. B. 4 B. & A. 582.

The memorandum for charter stated one-half of the freight to be paid in cash on unloading and right delivery, and the remainder by bill on London at four months' date; and then, after containing stipulations for unloading, discharging, demurrage, &c., added, the captain to be supplied with cash for the ship's use; and, in pursuance of the last stipulation, the master drew a bill on the freighters, which was duly accepted and paid. On the question whether this was not to be considered as a payment of freight in advance? It was contended, if it had been the intention of the parties that it should be a part payment of the freight, one would naturally have expected that the memorandum of charter-party would have been differently worded; the clause which speaks of these advances is altogether silent as to the terms of the supply, or the person by whom it is to be made: in fact, it comes to no more than this,—a stipulation that money shall be advanced to the captain for the ship's use. In the previous part of the instrument there is an express stipulation as to the manner in which the freight is to be paid; but it is altogether silent as to any deduction for the advances from the freight. The stipulation is, that one-half of the freight shall be paid in cash on unloading, and the remainder by a bill on London at four months' date. Now instead of this there would have been added, deducting thereout the money previously advanced, if such deduction had been intended to be made. It seems, therefore, that, in the absence of any such stipulation, this was money to be advanced as a loan by the freighter.

Per Cur. In this case the money advanced was money paid by the freighter for the benefit of the owner, which would constitute a debt due from the owner. Now we ought not to construe this instrument so as to alter this state of things, unless we can very clearly collect from it that such was the intention of the parties; and as that cannot be done here, the nature of the supply and the rights of the parties ought to remain the same, whether the ship earns freight or not; and we cannot construe the instrument, as stipulating that the money advanced was to be deducted from the freight, without making a new contract for the parties.

28. TASKER V. SCOTT. T. T. 1815. C. P. 6 Taunt. 234; S. C. 1 Marsh, 556.

A., the captain of a ship, having incurred expenses on her account, draws a bill on his owner in payment, with a memorandum that if it should not be honoured, the holder would insure the amount, and place the premium, &c. to the ship's and A.'s account. The bill is indorsed to B., and by him presented for acceptance, but dishonoured; and B. then effects an insurance, the interest being declared to be on the bill. In an action by B. against A. for the premium and expenses, it was objected, 1st. That this was an illegal insurance, and not available against the underwriters, being an insurance without interest, and prohibited by stat. 19 Geo. 2. c. 37; and therefore that the premium could not be recovered back. 2dly. That the insurance should have been on the ship, and not on the bill, and on the voyage, instead of for three months, because the owners would have had no benefit from the insurance in the form in which it was effected. The jury found a verdict for the plaintiffs.

Per Cur. We cannot say, that on further consideration we think there is any weight in either of these objections. As to the insurance being for time, and not on the whole voyage, there was no particular insurance prescribed; but it was left to the discretion of the holders of the bill; and if they have exercised that discretion honestly, we see nothing to control it. With respect to the illegality of the insurance, as to which we desire that our opinion may be considered as confined to this particular case, the insured had this interest in the arrival of the ship, that by such arrival his debtors would have more ample means of paying the bill. It was on the authority given by the bill, and by the directions of the captain, that the insurance was effected; and the plaintiffs having previously advanced this money for the use of the captain, we think they are entitled to recover it back. In many cases this would be an available security; indeed, in all cases but that of British vessels; and we see no necessity for inquiring whether this were a British ship or not.

29. *LOWRY V. BOURDIEU*. M. T. 1782. K. B. Doug. 468.

The plaintiffs had lent to Lawson, captain of the Lord Holland East India-man, 26,000*l.*, for which he had given them a common bond in the penal sum of 52,000*l.* While he was with his ship at China, the plaintiffs got a policy of insurance underwritten by the defendant and others, which was in the following terms: "At and from China to London, beginning the adventure upon the goods from the loading thereof on board the ship at Canton in China, &c., upon the said ship, &c., from and immediately following her arrival at Canton in China, valued at 26,000*l.*, being the amount of Captain Patrick Lawson's common bond, payable to the parties as shall be described on the back of this policy; and it bears date the 16th day of December, 1775; and in case of loss no other proof of interest to be required than the exhibition of the said bond, warranted free from average, and without benefit of salvage to the insurer." At the head of the subscriptions was written, "on a bond as above expressed." Captain Lawson sailed from China, and arrived safe with his privilege (as it is called) or adventure in London, on the 1st day of July, 1777, none of the events insured against having happened. The receipt of the premium was acknowledged on the back of the policy. In 1780 the insured brought this action for a return of the premium, on the ground that the policy being without interest, the contract was void. The cause came on before Lord Mansfield, who was of opinion, that the policy was a gaming policy, prohibited by the stat. 19 Geo. 2. c. 37; and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior est conditio possidentis* was applicable to the case, and the plaintiffs could not recover the premium. A verdict was accordingly found for the defendant, agreeably to his Lordship's direction; but the next morning he expressed a doubt as to the propriety of his opinion, because the money had been paid upon an executory agreement, which could never have been completed; and the first day of this term was obtained a rule to show cause why a new trial should not be granted. It was insisted that the contract was to be considered as executory in its nature, the premium having been paid before the risk commenced.

Lord Mansfield. It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance; mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form, but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue; 8 T. R. 13; 3 B. & P. 75. They are mere games of hazard like the cast of a die. In the present case the nature of the insurance is known to both parties. The plaintiffs say, "We mean to game, but we give our reasons for it; Captain Lawson owes us

* So where a merchant, who advanced money to the ship's broker to indemnify, and accepted, as a security, bills drawn by the captain upon the consignees of the goods, payable on the ship's arrival, it was helden that the merchant had not sufficient interest; *Palmer v. Pratt*, 2 Bing. 185.

[81] a sum of money, and we want to be secure in case he should not be in a situation to pay us." But they had no interest; for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from Lawson. This then is a gaming policy, and against an act of parliament, and therefore it is clear that the Court will not interfere to assist either party, according to the well-known rule, that *in pari delicto*, &c. Not that the defendants' right is better than that of the plaintiffs', but they must draw their remedy from pure fountains. I have returned to my old opinion; sometimes you miss the mark by taking too long an aim.

Willes, Justice. I shall make no apology for differing from the rest of the Court in a case where such great abilities have entertained two different opinions. The premium has been paid, and yet no risk run; for the policy was void from the beginning, and the insured could not have recovered from the underwriters if the ship had been lost. But I cannot think it a gaming policy. It does not appear to me that the parties had an idea they were entering into an illegal contract. The whole was disclosed, and they thought there was an interest. This was a mistake; but it is a new point of law. The case cited from *Precedents in Chancery* is not perhaps decisive, but goes a great way, and it would be very hard that a party should lose what he had paid under a mere mistake. I think in conscience the defendant ought to refund the premium.

30. KENT V. BIRD. E. T. 1777. K. B. Cowp. 583.

In fact, to constitute a sufficient interest, the event insured against must be connected with the subject matter of the loss.

This was an action brought by the plaintiff, who was a surgeon on board an East Indiaman, against the defendant, a passenger in the same ship, to recover a sum of 1000*l.* upon a special agreement, bearing date the 18th July, 1774, which, after reciting that whereas the plaintiff agreed to pay to the defendant the sum of 20*l.* sterling at the next port the ship should arrive at, it was witnessed that he, the defendant, in consideration thereof, did undertake that the said ship should have her passage to China that season; and, in case she did not, then that he would pay the plaintiff the sum of 1000*l.* at the end of one month after the arrival of the said ship in the river Thames. At the trial it appeared that the plaintiff duly paid the amount of the 20*l.* to the defendant, at the next port, in pagodas; that the vessel being delayed below the Cape and Madras, in consequence of a miscalculation of five days in the reckoning, and the monsoons setting in earlier than usual, she lost her passage; that the plaintiff had some goods on board, which were liable to suffer by the loss of the season; and that, whilst it was still doubtful whether the ship would or would not save her passage, the captain had applied to each of the parties to persuade them to rescind the agreement, representing that the sum to be paid in either event would be more than the loser could afford; that the plaintiff was willing to have cancelled the agreement, but the defendant positively refused. The jury found a verdict for the plaintiff.

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Per Lord Mansfield. A policy of insurance is in the nature of it a contract of indemnity, and of great benefit to trade; but the use of it was perverted by its being turned into a wager. To remedy this evil the stat. 19 Geo. 2. c. 37. was made, which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perversion of this species of contract, and amongst others that of gaming or wagering under pretence of insuring vessels, &c., proceed under general words to prohibit all contracts of assurance by way of gaming or wagering. Here the plaintiff gives so much to the defendant, in consideration that the ship should save passage to China, and if not, then, upon her returning safe to England, he is to receive 1000*l.* In the first of these events which happened the defendant won; but he could not lose unless both happened. Is not this gaming? is not this wagering? If this were allowed all wagering policies would be turned into this form, and the act would be entirely defeated; if there is no interest in the case it is gaming and wagering. Therefore the rule must be made absolute.

31. *LUCENA v. CRAWFORD*. H. T. 1802. C. P. 3 B. & P. 75.

Per *Chambres, J.* It would be a strange thing if freight could not be the subject of protection by an instrument which had its origin from commerce, and was introduced for the very purpose of giving security to mercantile transactions. It is a solid substantial interest, ascertained by contract, and arising from labour and capital employed for the purposes of commerce; but even in this case, the existence of a subject out of which freight may arise or be earned is necessary, as is settled by the case of *Tonge v. Watts*, lately cited and approved of by Lord Kenyon in the case of *Thompson v. Taylor*. The insurance of profits, ascertained by positive contract, may be equally just and reasonable, and is hardly to be distinguished in principle from the case of freight.

Freight may be insured;

32. *FORMES v. COWIE*. M. T. 1808. N. P. 1 Campb. 520.

The owner of a ship sent her to St. Domingo with a cargo to be bartered for goods there, which she was to bring back to England. When a small part of outward cargo had been unloaded and bartered for goods, which were put on board, the ship was lost, but the remainder of the outward cargo was saved, and bartered for other goods, which would have formed a sufficient cargo for the ship, if she could have performed the homeward voyage. Action on a policy on the ship's freight at and from St. Domingo.

But the amount actually loaded can only be recovered.

Lord Ellenborough. The underwriter does not insure that the ship shall have a freight, but only that the owner shall be indemnified for loss of the freight of goods put on board. What goods were on board when the ship was lost? The outward goods. They were not to be brought home on freight; they were to be bartered at St. Domingo. They were the means by which the homeward cargo was to be procured. How then has the plaintiff been damaged upon the subject matter of this insurance? By losing the freight of the fifty-five bales of cotton; and that he has been already paid by the defendant. [83]

33. *LUCENA v. CRAWFORD*. M. T. 1806. C. P. 2 N. R. 269.

Per *Car.* A point arose in *Grant v. Parkinson*, but was not determined, the Court being of opinion that the words in dispute, viz. "profits valued at 1000*l.* without other voucher than this policy," only made it a valued policy, and did not amount to a dispensation from proving interest. They observed, that though the subject of insurance was profit, yet that the risk was in fact incurred by ships or goods upon which the profit was dependent, and the preservation or destruction of which occasioned the profit or loss; and that an insurance upon the profits of any ship or goods by way of wager would be a mere evasion of the statute, and though not within the words must be taken to be within the spirit.

Expected profits may be insured;

34. *GRANT v. PARKINSON*. M. T. 1781. K. B. Cited Park, 354.

This was an action on a policy of insurance on the ship *Providence*, at and from Surinam, or whatsoever other ports in the West Indies at which the ship might load to Quebec. At the trial, before Lord Mansfield, the principal question on the merits was, whether the plaintiff had an insurable interest? It was an insurance on the profits expected to arise on a cargo of molasses belonging to the plaintiff, who had a contract with government to supply the army with spruce beer. Lord Mansfield thought it an insurable interest. But the part of the case which calls for our attention at present was a clause declaring, "that in case of loss, it was agreed, that the profits should be valued at 1000*l.* without any other voucher than the policy." This, it was insisted, rendered the policy void, as well within the letter as within the spirit of the 19 Geo. 2. c. 37. Lord Mansfield, at the trial, inclined to think that the contract was a fair one; but still he could not get over the objection, the instrument being void on the face of it. His lordship, however, saved the point for the opinion of the Court, a verdict being entered for the plaintiff, subject to that reference. In Michaelmas Term following, the matter came on to be heard; when, after full argument at the bar, Lord Mansfield, C. J. said: "I have, since the sitting at Guildhall, on further consideration, changed my opinion; I then thought the present policy within the act of parliament; I now think oth-

As the profits of a cargo of molasses may be insured;

erwise. On the construction of the act it has uniformly been held that a valued policy is not void. It is incumbent on the plaintiff to prove interest; but it is not necessary to go into the whole value. In the case of *Lewis v. Rucher* this doctrine was much considered." (Here his lordship read the words already reported, and then he proceeds thus:) "This insurance is on the profits of a cargo, belonging to a man having a contract to supply the army, and if it arrive the profits are pretty certain. The meaning of the policy is, not to evade the act of parliament, but to avoid the difficulty of going into an exact account of the *quantum*. I cannot distinguish it from a valued policy; there is no pretence for saying it is a wagering one." The other judges concurred, and the *postea* was given to the plaintiff.

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Or on meho
gany.

35. *HENRICKS v. MARGETSON*. T. T. 1802. K. B. 2 East, 549.

This was an action on the same policy against two different underwriters. It was a policy of insurance at and from Bourdeaux to Hamburg, on imaginary profit; a verdict was found for the plaintiff. A motion was made for a new trial. It appeared by the report, that the ship was totally lost off the coast of Sicilly, but that all the cargo, except one barrel of indigo, was saved, and carried to Hamburg in another ship, at the expense of the underwriters; and the question made on the motion for a new trial was, whether the ship, being lost, but the cargo carried to Hamburg in another ship, the assured could recover as for a total loss of the profits. But the Court held, that there should not be a new trial; that the underwriters were not at liberty to send the cargo to Hamburg, at what time and in what ship they pleased.

Lord Mansfield said: "The meaning of the policy seems to be, that the ship and cargo shall arrive at the destined port, and is on the profit of that particular ship and cargo; but the market varies, and may depend on twenty-four hours sooner or later, so that unless the very ship and cargo arrive, the profit may fail, and the insurance is lost." Rule discharged.

36. *EYRE v. GLOVER M.* T. 1812. K. B. 16 East, 218; S. C. 3 Campb. 276.

In fact, pro
fits may be
insured *eo*
nomine,

The plaintiff had chartered the *Elizabeth* from Hull to Riga, to receive from their agents there a full cargo of Hemp or hay. That she sailed from Hull under the King's license, and complied with all the terms of it, and arrived at Riga on the 23rd of September, 1809. That the plaintiff's agents on the 24th of October, 1809, shipped a cargo of flax on board the *Elizabeth* at Riga for Hull, in which the plaintiff was interested from thence to the time of the loss of the invoice, value of 5,116*l.* 4*s.* 6*d.*; the profit on which, supposing it to have been shipped and to have arrived in a sound state, would have been to the amount insured, which was 1,000*l.* The ship and cargo were captured by the Danes on the 17th of November. Objection was taken at the trial that this was a gambling policy, and therefore void; but Lord Ellenborough, C. J. overruled the objection, seeing no distinction in principle between an insurance on profits valued, which has been held to be legal, and on profits without the valuation being ascertained in the policy. On motion for a new trial.

Per Cur. Are profits any thing more than an excrescence upon the value of the goods beyond the prime cost? The difficulty of the calculation cannot affect the question of interest or the legality of the contract; short interest means no more than a short profit on the cargo to the extent of the whole sum insured. Rule refused. See *Hodson v. Glover*, 6 East, 316; and *King v. Glover*, 2 New Rep. 206.

37. *HODGSON v. GLOVER*. E. T. 1805. K. B. 6 East, 316.

[85]
Whether
the policy
be valued
or open;

In an action upon an insurance upon profits of a cargo of slaves, valued at 400*l.*, the plaintiff declared for a total loss by perils of the seas, and it appeared that the vessel was wrecked, whereby many of the slaves were lost, but the remainder got into the market, and were there sold. The Court held, that, although the produce of the slaves sold did not give a profit upon the whole adventure, the plaintiff was not entitled to recover, because it did not appear that if there had been no shipwreck, and all the slaves had got to market, any profit would have been produced.

38. LA CROIX v. HUENES. E. T. 1781. K. B. Cited Park on Ins. 356. And such an insur-
 Action upon a policy of insurance on the ship *St. Domingo*, at and from *Omoa* to *London*; upon which a case was reserved for the opinion of the *Court*. The facts of the case were these: Captain *Luttrell*, commanding five of his Majesty's ships, and Captain *Dalrymple*, commanding a party of the land forces, captured two Spanish register ships, lying under the protection of *Fort Omoa*; that the ship *St. Domingo* (on which the insurance was made) was one of the prizes, and was coming home laden with the property then captured; upon which ship the defendant underwrote 500*l.*; and that the ship was lost by the perils of the sea. The question was, whether, by virtue of the prize act of the 19 Geo. 3. c. 67. the officers and crew of the ships under Captain *Luttrell* had such an insurable interest in the *St. Domingo*, as to entitle them to recover?

Lord Mansfield. There are two questions in this cause. 1st. Whether the sea-officers had an insurable interest? This will depend on the prize act and proclamation. 2dly. Whether possession would entitle them to insure, upon the bare contingency of a future grant from the crown? As to the first, consider the act of parliament, which gives to all the people on board, that is, to the *stiff-officers*, commanders, and other officers, to the seamen, marines, and soldiers on board every ship and vessel of war, the sole interest and property of, and in all and every ship and vessel, goods and merchandises, which they shall take during the war, after condemnation. Does the act say that seamen only shall take? does it leave a joint capture by the army and navy undefined? Certainly not. Suppose, for instance, a case which I remember to have happened: a Dutch and English fleet combined captured some ships: the English sailors could not take solely; nor could the act mean that they should have nothing. In the case in question, suppose Captain *Dalrymple* had given no assistance, is there any doubt that Captain *Luttrell* would have taken the whole? The only difference is, that now he has not the merit of a sole capture. The word soldiers in the proclamation means soldiers on board the ship. Thus it stands on the act and proclamation. But supposing that doubtful, as far back as Queen Anne's time down to the present, wherever a capture had been made by a king's ship or privateer, the crown has always given a grant of it after condemnation. There is no instance to the contrary. Is then the contingency of the ship's coming safe such an interest as the captor may insure? Insurance is a contract of indemnity; some interest is necessary, but not any particular form of interest; it does not depend on a vested formal interest. The question is, whether this contingency is such a benefit to the assured as will make it a loss to him if the ship does not arrive? An assurance of the profits of a voyage was holden to be good. The agent of prizes may insure the arrival of a ship which will produce him profit; for though he has not the possession of the property, he has such an interest in the ship coming home as that he may insure. Here the possession is in the assured, and a certain expectation of receiving the property captured from the crown, which gives him an interest in the arrival. It is not a vested interest, but such an expectation as never was defeated. Judgment for the plaintiff.

39. GOWIN v. LONDON ASSURANCE COMPANY. M. T. 1758. K. B. 1 Burr. 489; S. C. 1 Blac. Rep. 103.

Meybohm, a merchant of *Petersburgh*, corresponded with *Amyard*, of *Lon-* Various per-
don, and was greatly indebted to him; *Amyard* sent a ship to *Petersburgh* for sons may
 goods, 19th August, 1756, and insured 2,800*l.* on her homeward bound voy- insure sever-
 age, viz. on goods from the *Sound* to *London*, whereof 1,900*l.* was under- al interests
 wrote on or before the 25th of September, and 90*l.* on or about the 28th of on the same
 October. In the mean time *Meybohm*, on the 7th of September, writes to thing, and
Amyard that he should send him goods as per invoice, and desires him to in- each to the
 sure. This letter arrived in October, so that only the 900*l.* could be insured luc. whole va-
 in consequence thereof. After sending this letter, *Meybohm* indorses the bill of lading of the cargo to one *Jamesz*, a merchant at *Moscow*; *Jamesz*

sends them indorsed to Uthoff, his correspondent in London, desiring him to insure the whole. Uthoff received them on the 15th of November, and the defendant insured them at and from the Sound to London for 2,300*l.* acknowledging that there had been a former consignment of the goods and an insurance thereon. In the voyage the ship and cargo were totally lost. Question, whether the plaintiff, as trustee for Jamesz, ought to recover the whole or only half of the sum insured?

Lord Mansfield, C. J. The defendant insists that in the present case, there is a double insurance; which must mean, that the plaintiff can recover a double satisfaction. But how can Jamesz virtually receive any benefit of Amyard's policy, though Meybohm's indorsing the bills of lading to him carried the interest? How does it appear that there was any such policy as Meybohm's? *Non constat*, that Amyard insured for him at all; he certainly insured 1,900*l.* on his own account. But supposing the whole to be Meybohm's policy, can Jamesz come for a satisfaction upon it? He certainly cannot, without a declaration of trust from Amyard. Amyard, as factor for Meybohm, has possession of the policy; and factors have a lien on the goods of their principals for their own debts. In *Krugio v. Wilcox*, February 1, 1755, before Lord Hardwicke, the Court decreed that a factor has a lien on goods consigned to him, for the general balance due to him, as well as for incidental charges attending the particular goods in his hands; but this lien remains so long only as he keeps the goods in possession; he has a special property for this purpose. If, therefore, Meybohm had come against Amyard, as trustee for the policy, he must have paid the balance due to him. But supposing it only doubtful whether Jamesz could or could not recover upon Amyard's policy, shall this Court put him upon the experiment when there is no fraud, no concealment whatever? In fact, though this is in sound a double insurance, yet in reality it is only two insurances. A double insurance is where a full value of interest is insured on different policies by the same man; that is not the case here.

40. *LUCENA v. CRAUFORD*. M. T. 1806. C. P. 2 N. R. 269.

Per Cur. Where a ship and cargo are insured to the full value, and money lent on bottomry or *respondentia*, the lender may insure, as well as the owner of the ship and cargo. It has been expressly decided that a creditor may insure the life of his debtor; for though he has no right depending upon the life of his debtor, he may be essentially injured by his death. With respect to the statute of the 19 Geo. 2. it was clearly established at law, among all the commercial nations of Europe, that the insured must have an interest in the thing insured, and could not recover without proving that loss; and herein the marine law differed from the common law of England, which sanctioned an action on a wager, without any interest in the parties but what was created by the wager itself.

41. *NEALE v. REID*. T. T. 1823. K. B. 1 B. & C. 661; S. C. 3 D. & R. 158.

A. sells goods to B. in America, to be shipped for an European port and paid for by bills in different sets and at different dates, drawn by B. in favour of A. upon C. and Co., a mercantile house in London: D. is appointed supercargo and joint trustee by A. and B., for securing remittances to the house in London, in order to honour the bills. The goods being shipped for Europe, B. & D. respectively advised C. and Co. of the transaction, who effect insurance upon the cargo by B's directions and at his expense. The ship on her voyage is captured, and abandons the cargo to the underwriters as for a total loss, the amount of which is paid to C. and Co., in London, who place it to the credit of B. The London house honour the first set of bills, before any fruits are received from the policy, and advise A. of that fact, in consequence of a letter received from him upon the subject of the bills, informing him that they could then say nothing about the bills, as the fate of them would

* So upon the principle that a policy will only enure to protect the interest insured, the statement in case reserved, that the insurance was effected on behalf of a certain person, precludes the Court from taking into their consideration a count in the declaration alleging a different interest; see *North v. Thompson*, 11 East, 428.

As, where money is lent on bottomry or *respondentia*, the lender may insure as well as the owner of the ship and cargo.

But if a policy be effected on behalf of a person having a certain interest the proceeds of the insurance cannot be claimed by another person not privy to the insurance who has a distinct interest in the same subject matter.

depend (not being accepted) upon the state of B's account when they became due; with an assurance, however, that they would do every thing they could with propriety to further the views of all parties. By a subsequent letter they advise him of the payment of a second set, stating that they did not know what would be the fate of the third, which had not then appeared for acceptance, but that they would do all they could to prevent loss to the parties. Part of the remaining set of bills is subsequently paid, but the rest is refused payment by C. and Co.; B. becomes bankrupt, and C. and Co.'s account with him prior to, and with his assignees subsequent to, his bankruptcy, for all the money ever received by them on his account. A. receives under B.'s commission a dividend upon the bills remaining unpaid; and for the balance, his administrators bring an action for money had and received against C. and Co. The Court held that the action was not maintainable. [88]

42. RHIND v. WILKINSON. H. T. 1810. C. P. 2 Taunt. 237.

On the question as to an averment of interest at the time of effecting the policy. The Court held, as to the time of the commencement of the plaintiff's interest, that if a declaration had averred that he was interested at the time of the ship's sailing, or that the policy was made on a certain day, and that afterwards on a subsequent day the plaintiff acquired an interest, it would have sufficed; and if that would have been good, the allegation of interest at the time of effecting the policy was an immaterial allegation, and needed not to be proved. It was immaterial to aver interest at any day previous to the commencement of the risk. It is every day's practice to insure goods on a return voyage long before the goods are bought. An insurable interest at the commencement of the risk suffices.

(C) RELATIVE TO WHO MAY BE INSURERS.

1. EVERETH v. BLACKBURN. H. T. 1817. N. P. 2 Stark Rep. 66.

Action of *assumpsit* on a policy of insurance. The defence was, that the policy was void, since the plaintiff's interest was founded on a bottomry bond, given jointly to the plaintiff and one Hilton, the statute 6 Geo. 1. c. 18. s. 12 prohibiting the lending money by two jointly upon bottomry as well as joint insurance by two. It was for the plaintiff contended that the act was merely meant to prevent insurances by joint stock companies, and could only be applied to persons becoming partners for the mere purpose of insuring; whereas, in this case, the plaintiff and Hilton were general partners; but Lord Ellenborough held that this made no difference, since they were still partners for that purpose. Plaintiff nonsuited. The 6 Geo. 1. prohibited persons not therein authorised from being insurers; and the association was equally illegal, whether the parties were or were not connected in any extraordinary manner.

* At the common law, any person in his individual and separate capacity, or any number of persons forming a society or partnership, might have been insurers; but it having been found by experience that particular underwriters, after having received large premiums for the insurance of ships &c. at sea, became bankrupts, or otherwise failed in answering or complying with the terms of their policies of assurance, to the ruin of many merchants and to the discouragement of adventures at sea, and to the great diminution of trade and public revenues of the kingdom, it was deemed advisable to establish two distinct corporations, with competent funds for the assurance of ships, goods, or merchandises at sea, or going to sea, on the supposition that merchants would think it much safer to depend on the assurances of either of these corporations than on those of private or particular persons, at the same time leaving to the merchants their option to assure with private underwriters, if they should prefer it. To carry this design into effect, the stat. 6 Geo. 1. c. 18. authorised the King to grant charters to two distinct companies for assurance of ships, goods, and merchandises at sea or going to sea, and for lending money on bottomry.

In pursuance of the powers given by this statute the Royal Exchange Assurance and the London Assurance companies were established by charters bearing date the 22d day of June, 1720. By the 12th section of the before-mentioned statute, in order to prevent any competition between these two corporations and any other public body, it is enacted, that all corporations, societies, and partnerships (other than the said two corporations) shall be restrained from underwriting; and if any corporation, or any persons acting in a society or partnership (other than the two corporations), shall presume to underwrite any policy upon ships, goods, or merchandises, at sea or going to sea, every such policy shall be, ipso facto, void, and the sums underwritten shall be forfeited; and bonds or other securities for money lent by way of bottomry by any corporation or society other than the two corporations, shall be, ipso facto, void, and such agreements adjudged to be usurious, and the offenders shall suffer as in cases of usury. It is to be observed, that the object of the preceding section is merely to avoid marine insurances being entered into by corporations or societies and

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Or dormant
or concealed
partner
ship.

2. MITCHELL v. COCKBURN. H. T. 1795. C. P. 2 H. Bl. 397.

Action on a policy of insurance. It appeared that the two bankrupts were engaged in a partnership for the insurance of ships, which was carried on in the name of Robertson, who at the time of his bankruptcy had paid a much larger sum for losses than he had received for premiums; and to recover a moiety of this sum from Tyler's estate was the object of this action. The Lord Chief Justice Eyre having nonsuited the plaintiff's at the trial, and a motion having been made to set the nonsuit aside, the Court said: This question depends on the true construction of the stat. 6 Geo. 1. c. 18. By that act the two corporations became the purchasers of the exclusive privilege of insuring on a joint stock; and to give effect to that privilege all other persons are prohibited from insuring on a joint stock. Now it appears on the first view, that the provisions of the act are at an end if a person, by merely insuring in his own name, can have the advantage of a joint capital, which the act meant to prohibit. This partnership, therefore, is contrary to the spirit of the act, and it is also contrary to the letter of it. The 12th section directs, that all societies, &c. This does not at all go to confine the meaning of the legislature to an avowed partnership insuring publicly in their own names, but the object is to any other joint stock being embarked in insuring. This being so, the consequence unavoidably is, that no contract can arise directly out of such a proceeding so as to be the foundation of an action.

3. HILL v. SECRETAN. M. T. 1798. C. P. 1 B. & P. 315.

Where a
debtor con-
signed

[90]

goods in fa-
vour of a
person to
whom he
was indebted,
and in-
dorsed the
bill of lading
to an agent
with the neces-
sary direc-
tions, the
executor
was held to
have an in-
surable in-
terest in the
goods con-
signed.

But if in
such an as-
sociation
each indivi-
dual subscri-
ber is only
liable for the
sum to
which his
name ap-
pears, and
not for the
default of
the other
subscribers,
it has been
held it does
not infringe
the statute.

An action on a policy of insurance. It was proved that the house of De la Torre, in Spain, consigned twenty-nine bags of wool to the house of Dubois and Son, in London, and indorsed the bill of lading to them: but that with the bill of lading came a letter annexed, directing Dubois and Son to hold fifteen bags for a house at Halifax, and the remainder for the plaintiffs at Exeter, which was the subject of the present insurance. It appeared also, that De la Torre was indebted to the plaintiffs in the sum of 500*l.*; but that they had given no orders for these goods. The ship was captured by the French, but afterwards retaken. The jury found a verdict for the plaintiffs. The court were clearly of opinion, that as the goods were consigned to Dubois and Son, to hold for the plaintiffs, the former were to be considered as trustees for the latter, from the time the goods were put on board the ship; that the circumstances of the plaintiffs being creditors of De la Torre raised a good consideration for the consignment; and, therefore, no doubt could be entertained of the plaintiffs having an insurable interest.

4. HARRISON v. MILLAR. T. T. 1797. K. B. 7 T. R. 340. n. d.; S. C. 2 Esp. 513.

Action on two policies of insurance, effected on the Anne and Elizabeth, from Dantzic to London. The plaintiff and defendant were members of "The Whitby Association," consisting of a number of persons, owners of ships, each of whom, in proportion to his shipping, paid a certain sum, which formed the stock of the society. The policies were signed by all the members; all insured for each, according to the respective values of their ships; and when any loss happened, the treasurer paid it out of the joint stock. The defendant's share was 1*l.* Each individual was only liable for the sum he had undertaken. Erskine, for the defendant, objected that the policies were void in law; but Lord Kenyon overruled the objection. His lordship said: "This does not infringe on the act of parliament, as the members of this association have only underwritten in their individual characters; but they cannot underwrite for themselves and partners. If all of them were liable up to the extent of their whole stock, it would be illegal. At present the members of this association only stand as individual underwriters for small sums." And

partnerships, other than the two privileged corporations; and in order to prevent any misconception on this point, it is expressly declared at the close of the section, that any private persons may underwrite, &c. as fully and beneficially as before this statute, provided they do not underwrite upon the account or risk of incorporation, or persons acting in a society or partnership.

the cause was at last referred to inquire, whether the money paid into court was sufficient to cover the loss?

5. *DOWELL v. MOORE*. H. T. 1815. N. P. 4 Campb. 166.

This was an action on a policy of insurance. The policy contained the usual liberty to sue, labour and travel, concluding with the words, "to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured." Here was a receipt for the premium in the common form, at and after the rate of eighteen guineas per cent. per annum. At the bottom there was a warranty against averages under particular circumstances; and against the ship's trading to or from certain enumerated places, together with a memorandum, stating that in case the ship should be lost or sold, the assured was to contribute and pay his proportional share of such losses, averages, &c. as should happen to the ships underwritten by the secretary for his account, three days after the day on which the ship might be lost or sold, and no longer.

And the same rule holds where several persons agree with one another to insure their respective vessels.

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Gibbs, C. J. I shall hold this policy to be void. The members of the association cautiously guard against any joint liability. According to the terms of their agreement, if, when a loss happens, any of the members are insolvent, the owners of the ship which is lost has no claim for their share of the contribution upon the other parties of the policy. Thus, for such portion of the sum insured, there is only the separate responsibility of a single underwriter, in the same manner as if the policy were subscribed at Lloyd's Coffee House by a number of unconnected individuals.

6. *EX-PARTE BELL*. E. T. 1814. K. B. 1 M. & S. 651.

On the last of January, 1809. William Bell and Scott, the bankrupts, verbally agreed to become interested in partnership, as to profit and loss, on policies of insurance on marine risks, to be subscribed by Scott, in his own name. And on the 1st of January, 1810, it was farther verbally agreed between them, that such partnership should be extended as well to policies to be subscribed by Scott for William Bell as to policies to be subscribed by Scott in his own name. For some time previously to the year 1809 William Bell had been in the habit of advancing money out of the funds of the said house of Bell and Co. to Scott, for his accommodation. In the course of the years 1809 and 1810 Scott continued to apply to William Bell, from time to time, for advances of money; in consequence of which application, William Bell, in the year 1809, advanced money to Scott, from time to time, out of the funds of the house of Bell and Co. to the amount of 10,592*l.* 17*s.* 3*d.*, which amount was reduced by repayments in the course of that year, leaving a balance at the end of the year 1809, due from Scott to Bell and Co., on account of such advances of 507*l.* 12*s.* 10*d.*, including therein the sum of 317*l.* 14*s.* 11*d.* And in the year 1810, William Bell advanced money to Scott, from time to time, out of the funds of the house of Bell and Co., to the amount of 6280*l.* 6*s.* 10*d.*, which amount was reduced by repayments from time to time, leaving a balance on the 31st of August, due from Scott to the house of Bell and Co. on account of such last-mentioned advances of 4418*l.* 3*s.* 7*d.*, making, together with the balance due at the end of the year 1809, the sum of 9495*l.* 16*s.* 5*d.* Of the monies so advanced to Scott, in the years 1809 and 1810, the whole, except the said sum of 317*l.* 14*s.* 11*d.* was on account of payments to be made on policies of insurance, underwritten by Scott on the partnership account between him and W. Bell, in pursuance of the verbal agreement so made between them; but no specific sum was applied for by Scott, or advanced to him, for any specific loss or payments on any particular policy. The advances of money were all made by William Bell, by drafts on their bankers. No profits have accrued upon the underwriting of such policies.

But one of two underwriters in partnership cannot recover back money advanced to the other on account of payments to be made on policies underwritten on behalf of both whether the money was advanced in payment of any specific loss or generally on account.

Per Cur. We take it for granted that this is the usual way in which one partner makes advances to another, and this was not a transaction, as it has been put in argument, of a mixed nature, combining a legal as well as an illegal contract, to the former of which these advances might be ascribed; but

[92] the whole was illegal. Nor does this case fall within *Petrie v. Hannay*, and *Frakney v. Reynous*, as they were described by *Eyre, C. J.*, as being one step removed from the illegal contract; it is to carry into effect the illegal contract itself. Under these circumstances we think an action could not be maintained to recover back these advances. It is unnecessary to go through the other cases of *Mitchell v. Cockbourn*, and *Aubert v. Maza*. This is clearly an attempt to recover back money advanced for the furtherance and in the very execution of the illegal contract.

7. *BOOTH v. HODGSEN*. M. T. 1793. K. B. 6 T. R. 405.

So, premiums for policies subscribed by A. received by B. under a partnership insurance, contrary to the 6 Geo. 1. c. 18. cannot be recovered by A. from B.

A. and B. agreed to become partners as underwriters of policies for the assurance of ships at sea, in the profits as well as losses arising therefrom, but that the name of A. only should be used in the subscription of such policies. In pursuance of that agreement policies were underwritten, and the premiums received by B. An action having been brought by A. to recover his moiety of the premiums, the Court held: The plaintiffs can only recover either on an expressed or implied assumpsit. In this case there is no express assumpsit, and the objection to an implied one is, that on the whole case disclosed to the Court, no promise can be implied except that which arises out of (what we say is) an illegal contract. It was argued the first time on this ground, that the action might be supported because it was not bottomed on an illegal contract; but the fact is otherwise; for if there had been no contract of partnership the defendants would not have received this money. The plaintiffs wish us to consider the case as if the partnership had never existed, and then they say, taking this to be an insurance only by G. Browne, it is a valid contract, and his assignees may recover the premiums received on his account; but we cannot decide on a part of the case, and taking the whole together, an assumpsit cannot be raised from one part of the case when the other parts of it negative an assumpsit. The plaintiffs desire us to infer that the money was received by the defendants to the use of G. Browne; but the facts contradict that inference; for it appears they received this money for the use of the partners on an agreement of partnership which is illegal. The case of *Mitchell v. Cockburne* cannot be distinguished from the present: that is an authority for our deciding against the plaintiffs; and even without the authority of that case we should have had no hesitation in determining the same way.

8. *MITCHELL v. COCKBURN*. M. T. 1794. C. P. 2 H. B. L. 379; S. P. *ALLBERT v. MAZE*. E. T. 1796. C. P. 2 B. & P. 377.

And where A. and B. were engaged in partnership, contrary to 6 Geo. 1. and A. paid the whole of the losses, held that he could not sue B. for a moiety of the money paid.

The two bankrupts were engaged in a partnership for the purpose of insuring ships, &c., which was carried on in the name of Robertson, who previous to his bankruptcy, had paid a much larger sum for losses than he had received for premiums. One moiety of this sum his assignees claimed to be due to them from Tyler: and it was agreed between them and the assignees of Tyler that the account should be referred to arbitrators to ascertain the amount of the demand. The arbitrators awarded 1636*l.* 13*s.* 6*d.* to be due to the estate of Robertson on the score of insurances; and his assignees accordingly petitioned the Lord Chancellor to have that sum allowed them out of the estate of Tyler; upon which his lordship made an order that the petitioners should be at liberty to bring such an action at law as they should be advised, and that the assignees of Tyler should not set up her bankruptcy in defence of that action; in consequence of this the present action was brought, the declaration containing only two counts: The first for money had and received by the defendant to the use of the plaintiffs; the second on an account stated; and the defendant pleaded the general issue.

Per Cur. This question depends on the true construction of the statute 6 Geo. 1. c. 18; it seems to us that the object of the statute would be totally defeated if it were to extend only to those policies in which the names of all the partners were inserted. It expressly declares, that every policy subscribed by any person acting in a partnership shall be absolutely null and void, though it may be true that the party subscribing shall be estopped from setting up a secret partnership to defeat a *bona fide* insurance; and the reason is obvious—

trade is carried on according to the capital employed. Now the insurance would run to the extent of the capital in whatever name the policy might be subscribed; the object therefore of the statute was to present the employment of a joint capital, which would afford the greatest competition with the established corporation. With respect to the case of *Petrie v. Hannary*, one judge there hinted that his opinion might have been different if the question had been *res integra*. But it is sufficient to rest on the opinions of the two other judges, that in the case of partners in illegal contracts, if one pays the whole partnership debt, without the express consent and direction of the other, he cannot acquire a right of action against the other. So in the present case, as it does not appear that the payments were made by Robertson at the request or by the express direction or consent of Tyler, this action cannot be maintained.

9. *SULLIVAN v. GREAVES*. E. T. 1789. K. B. Cited Park on Ins. 8.

This was an action brought against the defendant to recover a sum of money received by him from one Bristow, to the plaintiff's use. The plaintiff was an underwriter, and the defendant was a broker; and a loss having happened upon a policy underwritten by the plaintiff, he had been obliged to pay it; but Bristow having agreed to take half the plaintiff's risk, had paid his moiety of the loss into the hands of the defendants, to recover it from whom this action was brought.

Lord Kenyon, C. J. "I am of opinion that the plaintiff cannot recover; for this is clearly a partnership within the act of parliament. If a single name appears on the policy, as in this case, the insurer shall never be allowed, if a loss happen, to defeat a *bona fide* insurance, by saying to an innocent person, there was a secret partnership between another and myself, and therefore the policy is void. But here the plaintiff is himself the underwriter, who comes to enforce an illegal contract. It is a partnership *pro hac vice*, and this party cannot apply to a court of justice to enforce a contract founded in a breach of the law." No motion was ever made to set aside the nonsuit, but two or three days afterward Lord Kenyon took occasion to mention to the bar, that he had stated the case to the other judges of the Court of King's Bench, who were unanimously of the same opinion with his lordship.

10. *BRANSON v. TADDY*. M. T. 1807. C. P. 1 Taunt. 6.

Jeyes and a person of the name of Metcalfe carried on the business of oilmen in partnership; and it was proved, upon the cross-examination of a witness called on the part of the plaintiff, that, by agreement between Jeyes and Metcalfe, whatever profits should arise upon the policies underwritten by Jeyes, were to be divided between them. It was objected upon this evidence, that, by the statute 6 Geo. 1. c. 18. s. 12. the transaction was illegal, and that the plaintiff, therefore, could not recover. The Chief Justice being of that opinion, they were accordingly nonsuited.

Per Cur. It appeared upon the trial, that Metcalfe and Jeyes were partners, and that these insurances were effected on their joint account. The law says, that "no persons acting in partnership shall presume to underwrite any policy for assuring ships or merchandizes at sea, but that every such policy shall be, *ipso facto*, void." How, then, can an action be maintained to recover these premiums? The statute would be mere waste paper, if one of several partners might underwrite a policy for the rest.

11. *REX v. LONDON ASSURANCE COMPANY*. T. T. 1822. K. B. 5 B. & A. 899.

A rule *nisi* for a *mandamus* to the defendants, requiring them to permit a transfer to the assignees of Timbrell, a bankrupt, of eighty shares in the capital stock of the corporation, then standing in their books in the bankrupt's name. The affidavits stated that a commission issued against Timbrell, who

* But it is reported to have been holden, that a broker who insured ships with an underwriter who had secret partners, might prove against the separate estate of the underwriter although his account had been always kept with the partnership; *ex parte Angorstein*, 1 Bro. C. C. 899.

So, where a person is whose name a policy was underwritten had paid the whole amount of a loss, and a secret partner paid his proportion into the hands of a broker, it was holden that the underwriter could not recover from the broker the share of the secret partner.

And an underwriter who had a secret partner participating in the benefit of his insurances, was holden not entitled to recover the premium from the insurer.*

The Royal Exchange Assurance

are considered as private companies."

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was then in partnership with two other persons, dated 8th February, 1821, under which he was declared a bankrupt, and assignees appointed. At the time he became bankrupt he held in his own right eighty shares in the London Assurance Corporation, by virtue of which he was a director, duly qualified under the charter constituting the association.

Per Cur. We are not aware of any instance of a *mandamus* like the present having ever been granted; and, were we to grant this, we should be called upon to interfere in all cases of dispute between the members of private corporations. This company, although carried on under a royal charter, is a mere private partnership; but the writ of *mandamus* is a high prerogative writ, and is confined to cases of a public nature; the rule, therefore, must be refused. Rule refused.

(D) RELATIVE TO THE POLICY.

(a) *Form of.*

1st. *Stamp.*†

1. RODERIC V. HERIL. M. T. 1811. N. P. 3 Campb. 103.

The policy must be duly stamped at the time when it is legally stamped as forwards.

In a former action for the same cause it appeared that the policy had not the privilege granted to the Royal Exchange and London Assurance companies, of effecting marine insurances and lending upon bottomry, in exclusion of all other societies or bodies of persons, was taken away by the statute 5 Geo. 4. c. 114. This statute however declared that it should not affect the rights and privileges of the two corporations, otherwise it cannot be than by making it lawful for other corporations and bodies politic, and persons acting in society or partnership, to grant and make policies of insurance and contracts of bottomry.

† The amount of the present stamp duties on marine insurance is fixed by statute 56 Geo. 3. c. 184. Sch. 1. Part 1. and is as follows:

1. Policies upon ship goods, or any other interest, (which may be legally insured) for any voyage, from any port or place in Great Britain and Ireland, or Guernsey, Jersey, Alderney, or Sark, or the Isle of Man, to any other port or place in Great Britain, &c.

Where the premium or consideration shall not exceed the rate of 20s. per centum on the sum insured, if the whole sum insured shall not exceed 100l. s. d.
1 3

And if the whole sum insured shall exceed 100l., then for every 100l., and also for any fractional part of 100l. 1 3

And where the premium or consideration shall exceed the rate of 20s. per cent. on the sum insured, if the whole sum insured shall not exceed 100l. 2 6

And if the whole sum insured exceed 100l., then for every 100l., and also for any fractional part of 100l. 6

But if the separate interests of two or more distinct persons shall be insured by one policy, then the said duty at 1s. 3d. or 2s. 6d. shall be charged therein in respect of each and every fractional part of 100l., as well as in respect of every full sum of 100l. thereby insured upon any separate interest.

2. Policies upon ship-goods, or other property on board, or upon freight, or other interest (which may lawfully be insured), for any other voyage than is before specified, or for any certain time or period of time not exceeding twelve calendar months.

Where the premium or consideration shall not exceed the rate of 20s. per cent. on the sum insured, if the whole sum insured shall not exceed 100l. s. d.
2 6

And if the whole sum insured shall exceed 100l., then for every 100l., and also for any fractional part of 100l. 2 0

And where the premium or consideration shall exceed the rate of 20s. per cent. on the sum insured, if the whole sum insured shall not exceed 100l. 5 0

And if the whole sum insured shall exceed 100l., then for every 100l., and also for any fractional part of 100l. 5 0

But if the separate interests of two or more distinct persons shall be insured by one policy, then the duty of 2s. 6d. or 5s. shall be charged therein in respect of each and every fractional part of 100l., as well as in respect of every full sum of 100l. thereby insured upon any separate interest.

3. Policy of insurance, or other instrument whereby any insurance, commonly called a mutual insurance, shall be made, without any premium or pecuniary consideration, from any loss that might happen to any vessel, or merchandize on board of any vessel, or freight or other interest relating to any vessel, which may lawfully be insured.

Upon any voyage from any port or place in the United Kingdom of Great Britain and Ireland, the islands of Guernsey, British Alderney, or Sark, or the Isle of Man, to any other port or place in the said Kingdom or Isle of Man; for every sum of 100l. and also for each and every fractional part of 100l. s. d.
2 6

Upon any other voyage, or for any certain time or period of time, not exceeding twelve calendar months, for every sum of 100l. and also for each and every fractional part of 100l. 5 0

proper stamp, and the plaintiff was nonsuited. Since then the commissioners of stamps had permitted the proper stamp to be affixed to it on the payment of a penalty. For the defendant it was insisted, that the commissioners had no power to do so, and that the instrument was still a nullity. And the 35 Geo. 3. c. 63. s. 14. 16. was relied on. Lord Ellenborough said, the statute was imperative upon him; and that, as the policy was not duly stamped before it was effected, the broker could not recover any thing for effecting it.

2. *RAPP V. ALLNUTT*. E. T. 1812. K. B. 15 East, 601; S. C. 3 Campb. 106.

This was an action brought upon a policy of insurance made on the 14th of September, 1810, for 500*l.* on goods to be thereafter declared and valued on board the ship *Johannas*, at and from London, to any port or ports in the Baltic, with various liberties reserved to the assured; and a loss was alleged and proved to be, by hostile seizure of the Swedish government in her port of discharge. The question upon the merits was disposed of by the verdict of the jury for the plaintiff, upon the trial before Lord Ellenborough, C. J., at Guildhall; but a new trial was moved for in the last term, upon an objection arising upon the stamp acts, as to which the facts were these: the plaintiff was the agent and shipper employed for six different sets of owners, who divided between them in different proportions the whole interest of the cargo; the exact amount of the several interests was not known to the plaintiff on the 14th of September, when the insurance was effected, but it was estimated to amount altogether to 9500*l.* and the policy was effected on a proper stamp to that amount, considered as one entire sum. On the 25th of September the different interests were calculated, including the premiums and expences of insurance, indorsed upon the policy in the following proportions: 1660*l.*, 270*l.*, 1045*l.*, 808*l.*, 4495*l.*, and 1222*l.*, amounting numerically to the very sum insured; but on account of the different fractional parts of 100*l.* requiring, as it was objected, a stamp of a higher rate than upon one entire sum of 9500*l.* upon the same interest, the stat. 35 Geo. 3. c. 63. s. 1. imposes upon every policy of insurance of the description in question a stamp duty of 2*s.* 6*d.* for every 100*l.* progressively, and the like duty for every fractional part of 100*l.*; and sect. 14 avoids every contract unless properly stamped. This was followed by the stat. 48 Geo. 3. c. 149. schedule, article, policy of assurance, which provides that, if the separate interests of two or more distinct persons shall be insured by one policy, then the duty, &c. shall be charged thereon in respect of each and every fractional part of 100*l.*, as well as in respect of every full sum of 100*l.* which shall be thereby insured upon any separate and distinct interest. The Court held the stamp must cover the fractional part of 100*l.* in each interest.

3. *SLARWICK V. WADE*. M. T. 1811. N. P. 3 Campb. 127.

During the voyage a storm happened; and under an apprehension that the Union might have suffered in it, the plaintiff could not get the insurance done under 50 guineas per cent. On the 17th a slip was written, by two underwriters, for 100*l.* each at that premium; and between six and seven the same evening the plaintiff called at the defendant's counting-house, and left word, that he had made the insurance at 50 guineas per cent. premium. The defendants were then from home, but in about an hour after they sent the plaintiff a letter in the following words: "Mr. Warwick, we are much surprised to hear you have given 50 per cent. on the Union, from Wells to London, when you had no such authority from us; we therefore cannot submit to it. (Signed) Slade and Pettit." The stamped policy was not written out or signed till two days after; when, being offered to the defendants, they refused to receive it. Garrow, for the plaintiff, insisted, that however high the premium was, his client was bound to get the insurance effected, and would have been liable to an action if he had not done so. The supposed countermand came too late. When he had entered into the agreement with the underwriters, and the slip had been signed, after that he was bound in honour to pay the premium to the underwriters, and the policy when formally executed must have reference back to the signing of the slip. Lord Ellenborough. I cannot take notice of these honorary engagements. Till the stamped policy was signed by the underwri-

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And where the distinct interests of several are insured under one entire sum "to be thereafter declared and valued," the stamp must cover the fractional parts of 100*l.* in each interest.

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A practice formerly prevailed among insurers of recognising the terms of an insurance by subscribing a memorandum without stamp, call ed a slip, in which the terms of the contract were embodied provided the one to effect ing a formal policy; but the Court

will not
take notice
of it unless
stamped;

ters no binding contract was entered into, and the authority of the broker might be revoked. Therefore, supposing the original order would have empowered the plaintiff to give a premium of 50 guineas for a voyage from Wells to London, after the letter he had received in the evening of the 17th his authority was determined. The policy was not then effected. The revenue laws forbid me to look to what is called the slip. The plaintiff afterwards paid the premium in his own wrong; and there is no implied promise on the part of the defendants to reimburse him.—Plaintiff nonsuited.

Even to ex-
plain the po-
licy.

4. *MARDEN V. REED*. E. T. 1803. K. B. 3 East, 572.

A slip of paper, wherein the names of the underwriters were mentioned, in the order in which they had originally been applied to, and had agreed to underwrite (and which was different from that in which their names appeared on the policy), having been tendered in evidence to show the true order of the names for the purpose of letting in evidence of a false representation made to the first underwriter in fact. The Court were of opinion, that such paper could not be received in evidence for want of a stamp; the effect of the evidence being to show, through the medium of a writing, that the contract entered into between the parties was different from that which it appeared to be on the face of the policy.

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But it has
been holden
that a repre-
sentation
made by an
insurance
broker
when the
names of
the insurers
are put up
on a slip is
binding.

5. *EDWARDS V. FOOTNER*. M. T. 1808. N. P. 1 Campb. 530.

About a week before the policy was signed the names of the underwriters were put down upon a slip, when the broker stated to the defendant "that the Fanny was to sail with the Hopewell and Young Roscius, both armed ships, and that she was herself to carry ten guns and twenty-five men." There was no evidence of any conversation upon the subject having passed between the parties, either when the policy was signed, or in the intervening period. In fact, the Fanny sailed by herself, and carried only eight guns and seventeen men. Lord Ellenborough. If a representation is once made, it is to be considered as binding, unless there is evidence of its being afterwards altered or withdrawn. In the case cited the vessel was stated to be an American when the ship was made out; but when the policy came to be signed the broker said generally, "that it was an insurance of goods in the Herman," without describing her as of any particular country. There the first conversation was qualified and contracted by what followed; but here there is no evidence of any conversation upon this subject by the parties subsequently to the statement that the ship was to carry ten guns and twenty-five men; and this having taken place when the insurance was talked of, and the terms of it were agreed upon, it must be referred to the policy, and treated as a representation which required to be substantially complied with on the part of the assured. See *Christie v. Secretan*, 8 T. R. 192. Verdict for the defendant.

6. *SAWFELL V. LOUDIN*. H. T. 1816. C. P. 5 Taunt. 359; S. C. 1 Marsh. 99.

Action on a policy of insurance, which was effected the 3rd of December, 1812, on the ship *Sophia*, at and from Bristol to Port-Mahon, with leave to call at Gibraltar, and take in and discharge goods there, and with liberty to seek, gain, and exchange convoy in the English and Irish Channels, with or without letters of Marque. The words "on ship," were afterwards struck through with a pen; the following memorandum was inserted in the margin of the policy, signed with the initials of the underwriters: "The interest insured by this policy is declared to be on goods, as interest may appear, including all

A material
alteration
renders a
new stamp
necessary,
but not a
mistake in
consistent
with the
real inten-
tion;"

* The statute 35 Geo. 3. c. 63. contains an express provision to legalize alterations in the terms and conditions of a policy of insurance without a fresh stamp. It provides that nothing contained in the act shall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance duly stamped, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for, shall exceed the rate of 10s. per cent. on the sum insured; and so that the thing insured shall remain the property of the same person or persons; and so that such alteration shall not prolong the term insured beyond the period allowed by the act; and so that no additional or further sum shall be insured by reason or means of such alteration.

charges incident to a loss, and to pay average on each package of it separately insured. London, 7th December, 1812." The plaintiff was charterer of the ship; the ship had sailed from Bristol on the 19th of November, with a cargo to gain convoy at Falmouth; but owing to bad weather, was not able to make the latter port, and before she arrived at Gibraltar had sustained the damage which occasioned the average loss sought to be recovered in this action. At the trial, the jury found a verdict for the plaintiff, for the amount of the average loss. Whereupon, on a former day in this term, a rule nisi was obtained to set this verdict aside, and enter a nonsuit, on two grounds; 1st. That the above alteration of the interest from ship to goods rendered a new stamp necessary; and that therefore the policy was void by virtue of stat. 35 Geo. 3. c. 63. The Court, without hearing any argument on the second objection, took time to consider this point, and Mr. Justice Heath, on this day, delivered the opinion of the Court, which was, that the alteration was not such as to require a new stamp.

7. *ROBINSON v. TOURDY*. M. T. 1811. N. P. 1 M. & S. 217. n.; S. C. 3 Campb. 158.

Action on a policy of insurance. On the 16th of October the brokers called on the underwriters to subscribe the following declaration: "The interest attached to this policy is hereby declared to be shipped on board the Tweende Venner and the Neptunus." The defendant and the other underwriters put their initials to this declaration. However, it was a mere mistake on the part of the brokers; Brandt, Rooke, and Co. having no goods on board either of these ships, and having given no orders to declare upon them. On the 17th of November, the broker being directed to declare upon the America, called upon the underwriters to subscribe a declaration in the following form: "The declaration of interest on this policy made the 16th of October, by the Tweende Venner and Neptunus, is hereby cancelled, and in lieu thereof the following cargo, per America, is declared to form the interest, and is valued as follows," &c.

As where a mistake is made by an agent in declaring the interest to be on a ship by a wrong name, a new stamp is not essential to effect the alteration.

Lord Ellenborough. I am of opinion, that the declaration of interest does not require any assent on the part of the underwriters; they put their initials to it not for the purpose of expressing their assent, but to authenticate the declaration, and to prevent fraud in changing the subject matter intended to be covered by the insurance. The contract between the parties is complete when the underwriters have signed the policy. The declaration of interest is the mere exercise of a power conferred upon the assured; it is generally put upon the policy for convenience, but this is not necessary, nor is there any necessity for its being in writing. There was here a blunder in the names of the ships first declared; if this was without fraud and without prejudice to the underwriters, I think it might be corrected without the assent of the defendant and without a fresh stamp.

8. *KENSINGTON v. INGLIS*. H. T. 1807. K. B. 8 East, 273.

A policy of insurance was subscribed by the defendant on the 5th of February, 1800, and duly stamped, purporting to be a policy "on goods and specie on board of ship or ships sailing between the 1st of October, 1790, and the 1st of June, 1800, being the property which should first sail to a certain amount, and upon the vessels carrying the goods." After the 1st of June, 1800, but before any notice of the determination of the risk had been received, a memorandum was written on the policy, and subscribed by the defendant, whereby it was agreed to extend the time of sailing to the 1st of August, 1800. The Court held, that although by this memorandum the time of sailing was extended, yet the object of the insurance continued the same; and consequently the memorandum falling within the proviso contained in the 13th sect. of the stat. 35 Geo. 3. c. 63. did not require a stamp.

And the same rule applies to an alteration extending the time of the ship's sailing;

9. *WEIR v. ABERDEEN*. M. T. 1814. N. P. 4 Campb. 107.

Action on a policy of insurance at and from Portneuf to London, warranted to sail on or before the 28th of October, at six guineas per cent., to return three per cent. for convoy. On the 29th of November, of six guineas per

Or a liberty to discharge part of the cargo, the

vessel having more on board than she can safely carry;

cent. additional premium, "we agree to annul the warranty of sailing, and agree to return said six per cent. if sails with convoy on or before the 31st of October." For the defendant it was objected, that the policy, as altered, could not be read for want of a fresh stamp.

Lord Ellenborough. I think this alteration are justified by 35 Geo. 3. c. 63. s. 13. The policy is still on the same adventure, and its identity remains. The memorandum only modifies a subsisting contract. The alteration was made before notice of the determination of the risk originally insured; the thing insured remained the property of the same persons, and no additional sum was insured by means of such alteration.

10. HUBBARD v. JACKSON. M. T. 1811. C. P. 4 Taunt. 169.

Or cancel
ling a war-
ranty to sail
on a certain
day, or era-
sing marks
on goods
whose im-
port is
known;

A policy was effected at four guineas per cent. on hemp marked R. and valued, with certain returns of premium upon arrival at certain ports, and warranted to sail before the 20th of August, which was a summer's risk and premium. By a memorandum indorsed, the underwriters, for four guineas additional and the return of five shillings less for arrival, absolved the assured from the warranty of sailing before the 20th of August, so making it a winter's risk, and withdrew the mark of the hemp. It was insisted that this alteration in the policy was legal without a new stamp, being within the stat. 35 Geo. 3. c. 63. s. 13. and having the three requisites designated by that section: viz. 1st. The hemp remained the property of the same person, the plaintiff. 2nd. The alteration was made before any notice of the determination of the risk. 3rd. The premium of insurance exceeded ten shillings per cent. The withdrawing of the mark was only a dispensation with one proof of identity of the goods, to obviate any difficulty upon that head which might arise at the trial; as to the extension of the time of sailing, the very point that no new stamp became necessary on that account, had been decided in the case of Kensington v. Inglis, in error, 8 East, 273. In the case of Hill v. Patten, ib. 373. the change of the policy from "ship and outfit of a whaler" to "ship and goods" was clearly an alteration of the subject matter; yet there Lord Ellenborough went so far as to intimate, that the shifting of successive cargoes of goods on board the same ship, in the course of the same continued adventure, as in the African and other trades, out and home, might properly be considered as one continued subject matter of insurance, under the term goods; which is a much stronger case than this, where the hemp was identically the same, whether it was marked or not; and here it was marked.

Per Cur. The question is, whether the withdrawing the mark on the hemp be an alteration warranted by the stat. 35 Geo. 3. c. 63. s. 13. without a new stamp affixed? And by that act it is extremely clear that no alteration can be made in the subject insured. The 13th sect. speaks of making alterations in the terms and conditions of the policy, but says nothing of making any alteration in the subject insured. It was said by Lord Ellenborough in the case cited, that the subject could not be changed; it would be making quite a new contract between the parties, as for instance, the substituting wool for hemp. The words of s. 13. are, "Provided that the thing insured should remain the property of the same person." The words are express, and therefore, in this case, the question is, whether the alteration of the letter R on the hemp, is an alteration of the thing insured. If it is an alteration, the policy is void for want of a new stamp; but if it is not an alteration of the thing insured, it is an alteration in the terms of the policy warranted by this section, and no new stamp is required, and the verdict is right. It was argued that this alteration must be good, because all the exceptions of being under ten shillings per cent. out of legal time, &c. were negatived by the evidence. All this is true but it does not touch the question, whether this is an alteration of the subject matter? One does not well understand the meaning of these marks. In a general ship the mark is important to distinguish the property of A. from that of B., but here no cause appears for such marks. Here it is in evidence that the plaintiff has always great quantities of hemp ready to ship; it does not appear that the letter R denotes any particular species or quality of hemp, and except for

the circumstance of not having the mark alleged, in the first policy the plaintiff could have recovered on that policy without any alteration. We, therefore, are of opinion that this alteration is an alteration warranted by the 13th section of that act. At first it struck us that this was not within the meaning of the words "terms or conditions," this being rather a part of the description of the subject matter than a term or condition of the contract. But we think, on the whole, that no new stamp was necessary, and, therefore, the verdict is right, and the rule must be discharged.

11. *RAMSTROM V. BELL*. T. T. 1816. K. B. 5 M. & S. 267.

Policy on goods at and from Stockholm to Swinemunde, and the ship being driven into Wisby on the 30th of May, and detained there till the 9th of October. The assured, on the 1st of July, wrote to their agents in London, that the captain had been ordered to proceed to Königsberg, as they were not certain whether the enemy might be at Swinemunde or not, and that the passage of Königsberg was nearly the same, but rather the shortest and safest, and they desired the agents to arrange the matter with the underwriters, which letter the agents receiving on the 12th of July, applied to the underwriters for their consent to alter the policy by adding the words "Königsberg or Memel" after Swinemunde, which consent was obtained, and the ship and goods were afterwards lost in their voyage to Königsberg. On the question, whether this alteration did not require a new stamp, being within 35 Geo. 3. c. 63. s. 13. it was contended, upon reference to the stat. 35 Geo. 3. c. 63. s. 13. which saves the necessity of a fresh stamp in cases where an alteration in the policy is made before notice of the determination of the risk originally insured, which, according to *Kensington v. Inglis*, 8 East, 273. means such a determination of it as occasioned by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage; and, therefore, in that case, a memorandum written on the policy on a day subsequent to the time originally prescribed for the ship's sailing, extending the time of sailing, was held to require a new stamp; so a policy containing a warranty that the ship shall sail on or before a particular day may be altered pending the risk, by a memorandum cancelling the warranty, without a fresh stamp; and the altering of the mark on goods requires no new stamp. Now here the subject matter insured continued the same, and the interest the same, and the risk originally not being determined, was rather diminished by going to Königsberg.

Or adding another place of destination, requires no new stamp.

[102]

Per Cur. It seems to be, that the argument for the defendant has founded a contemplation to determine the voyage with the actual determination of it. The assured had purpose of change, arising *ex juxta causa*, and while it was in contemplation the proposal was made to the underwriter, and assented to by him, that Königsberg should be the ship's destination. If the underwriter had not assented the assured might have thrown the risk upon him by going to Swinemunde; instead of which the application is made for the underwriter's benefit. The act says, so that the alteration be made before notice of the determination of the risk. This alteration was made while there was only an intention to determine the risk.

12. *HILL V. PATTEN*. E. T. 1807. K. B. 8 East, 373; S. C. 1 Campb. 72. Action upon a policy of insurance, in consequence of some misunderstanding between the broker and his principal, as to the broker's instructions at the time of effecting the policy. An application was made to the underwriters, who agreed to alter it, which was done by a memorandum indorsed on the policy in these words: "It is hereby agreed, that the interest on this policy shall be on ship and goods, instead of ship and outfit, as originally declared." The ship was afterwards lost in the course of the voyage. It was objected at the trial, before Lord Ellenborough, at Guildhall, that however the policy might have been effected, in the original terms of it, through a misunderstanding between the principal and his agent, yet the contract was equally binding between the contracting parties at the time; and as the risk had once attached, it was not competent to the parties to make the alteration, though by consent, without a new stamp, goods being a distinct subject matter of insurance from

But any alteration as regards the subject matter of insurance, requires a new stamp;

[103] the outfit in such a voyage, and therefore not within the exceptions of the 35 Geo. 3. c. 63. s. 13. which enables the parties to make any alteration in the terms or conditions of a policy, so that the thing insured, which must be taken to mean the same subject matter of insurance, shall remain the property of the same person. The plaintiff, however, recovered a verdict, which was moved to be set aside.

Per Cur. The question in this case was, whether the alteration of this policy "upon ship and outfit" to one "to ship and goods" required an additional stamp, within the meaning of the statute 35 Geo. 3 c. 63. s. 13. The policy was at and from London to the South Seas, during the ship's stay and fishing there, and at and from thence to Great Britain, &c. The alteration was made from "ship and outfit," to "ship and goods," by consent of the underwriters, after the ship had sailed on the voyage insured, and of course after the policy had fully attached upon what was, at the time of such sailing, the thing or subject insured; viz. ship and outfit. Outfit, particularly for such a voyage as is described in the policy, differs materially from what is comprehended under the term goods. Outfit, in a fishing voyage, principally consists in the apparatus and instruments necessary for taking of fish, seals, &c. and the disposing of them, when taken, in such a manner as to bring home the oil, blubber, bone, skins, and other animal produce of the adventure with the greatest convenience and advantage. As far as the outfit consists of provisions put on board for the use of the crew, it is (according to the case of *Brough v. Whitmore*, 4 T. R. 206.) covered by an insurance on ship, being in effect part of the necessary furniture, stores, and equipment of every preceeding on a voyage. But outfit, though it may in this qualified sense be considered as part of the ship or ship's furniture, yet it cannot be considered as goods in any proper sense of that word, i. e. as part of the wares or cargo for sale, laden on board the ship? still less as part of the homeward-bound cargo in this voyage out and home; recollecting, that in a fishing voyage the only cargo on board the ship, from first to last, is in general the homeward-bound cargo, consisting of the immediate produce and result of the fishing adventure. The outfit originally insured being, therefore, thus essentially different from goods afterwards made the subject of insurance under this policy, the question is, whether such a change in the subject matter of the insurance may be made in a policy once effected, without an additional stamp, in virtue of the provisions of the stat. 35 Geo. 3. c. 63? The 13th section of the statute on which the section arises, provides "that nothing contained in the act shall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance duly stamped as aforesaid, after the same shall have been underwritten, or to require an additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for shall exceed the rate of 10s. per cent. on the sum insured; and so that the thing insured shall remain the property of the same person or persons; and so that such alteration shall not prolong the term insured beyond the period allowed by this act; and so that no additional or further sum shall be insured by reason or means of such alteration."

[104] 13. *FRENCH v. PATTEN*. E. T. 1808. K. B. 9 East, 351; S. C. 1 Campb. 72. Even tho' made after commencement of the voyage, and the risk has attached. A policy of insurance, originally underwritten on ship and outfit, was, after the ship sailed, declared by consent of all parties to be on ship and goods, by a memorandum written on a blank space in the body of the policy, but without any new stamp; and it having been before decided, that for want of the stamp the plaintiff could not recover as upon a policy on ship and goods, as the risk has declared by the memorandum, an action was now brought on the policy in its original state.

Per Cur. We must give the rule of law in this case, as far as we are compelled to do it, with reluctance, because it is against a party who perhaps meant to do no wrong at the time; but can the Court enforce an agreement

after the parties themselves have, upon the very face of the same instrument, declaration that it is not their agreement, and have actually a different one in the place of it? And we cannot say, that it is the same thing as if the memorandum had been written on a different instrument; for it is inserted in the body of the original agreement, and makes it speak a different language; it shows an entire alteration in the minds of the contracting parties. Then, finding that the substituted agreement cannot be enforced, because of an objection arising upon the stamp laws, the plaintiff now wishes to resort back to that which he has declared was not his agreement. There is another reason why this should not be permitted to him, because it is against the policy of the revenue laws; for it would hold out encouragement to break these laws, and to try alterations of this sort, if after an attempt made to alter a contract without a new stamp, it should be held that though the attempt were ineffectual as to the new contract of the parties, they could recur back again to the original agreement, and set that up again.—Rule discharged.

2nd. Description of the person insured.

1. *WILTON v. REASTEN*. M. T. 1787. K. B. Cited Park on Ins. 19.
In this case several plaintiffs were interested; the policy was made in the name of Mr. Williams Wilton and the rest of the owners, Mr. Justice Buller held the policy was void under the 25 Geo. 3.

2. *PRAY v. EDIE*. T. T. 1786. K. B. 1 T. R. 313.

Upon the 25 Geo. 3. c. 44. a question arose, whether, when the agent effect was formerly very much the practice to effect policies of insurance in blank, as it was called, that is, without specifying the names of the persons for whose use and benefit or on whose account such insurances were made; a practice which had been found in many respects, to be mischievous and productive of great inconveniences. This mischief was remedied at a very early period in Genoa and France by the marine ordinances of those countries, which required the name of the person insured to be inserted in the policy, and whether he was to be considered in the capacity of principal or factor. In England a similar regulation took place in the year 1774 with respect to insurances upon lives; but it was not till the year 1785 that any provision was made upon the subject as to policies upon ships and merchandizes, the statute of the 14 Geo. 3 having in terms exempted marine insurances from its operation. Subsequently, it was by the 25 Geo. 3. c. 44. declared, "That from and after the 5th day of July, 1785, it shall not be lawful for any person or persons who reside in Great Britain, to make, or cause to be made, any policy, or policies of insurance, upon his, her, or their interest in any ship or ships, or any goods, merchandizes, effects, or other property, without inserting in such policy or policies his, her, or their own name or names, or the person interested therein, or the name or names of the person or persons who shall effect the same, as the agent or agents of the person or persons so really interested therein, or for whose use or benefit, or on whose account, such policy or policies is or are underwrote; and that it shall not be lawful for any person or persons who shall not live or reside in Great Britain, to make, or cause to be made, any policy or policies upon his, her, or their interest, in any ship or ships, or on any goods, merchandizes, effects, or other property, without inserting in such policy or policies the name or names of the agent or agents of the person or persons so really interested therein, and for whose use or benefit, or on whose account the same is or are so made or underwrote; and that every policy or policies of insurances made or underwrote contrary to the true intent and meaning hereof shall be null and void to all intents and purposes." The decisions which have been made upon this statute have now become very immaterial; and are only referred to in order to show the complete history of that branch of the law which we are discussing; for such mischiefs and inconveniences were found to arise to persons so interested in ships or vessels from that act of parliament, that by a subsequent statute it was wholly repealed. But it was not deemed expedient again to allow of policies in blank; and therefore the same statute declared, that it should not be lawful "from and after the passing this act, for any person or persons to make or effect, or cause to be made or effected, any policy of assurance on any ship or vessel, or upon any goods, merchandizes, effects, or other property whatsoever, without first inserting or causing to be inserted in such policy the name or names in the usual style and firm of dealing of one or more of the persons interested in such assurance; or without, instead thereof, first inserting the name or names of the usual style and firm of dealing of the consignor or consignors, consignee or consignees, of the goods or property so to be insured, or the name or names, or the usual style and firm of dealing of the person or persons residing in Great Britain, who shall receive the order for and effect such policy, or of the person or persons who shall give the order or directions to the agent or agents immediately employed to negotiate or effect policy." The statute further declares that every policy made or underwrote contrary to the true intent and meaning of this act shall be null and void to all intents and purposes.

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principal resident abroad, the agent was to be named and designated as such. affects a policy for the principal residing abroad, it be necessary to insert his name in the policy as agent? Upon a debate, it was held, that if it be not stated that he effected the policy as the agent of the principal, the policy will be void within the statute. Another question also occurred in the same cause, whether it was not the intention of the legislature, when the principal resided abroad, that the agent should live in England? It did not become necessary for the Court to decide the latter question, but the leaning of the judges clearly was in the affirmative.

3. WOLF V. HORNCASTLE. M. T. 1798. C. P. 1 B. & P. 322.

But as the 28 Geo. 3. has repealed the 25 Geo. 3. and the latter is to be construed liberally. *Per Cur.* The legislature, thinking that they had drawn the string too tight, recited on the 28 Geo. 3. that it had been found by experience that great mischiefs and inconveniences had arisen to persons interested in ships, and persons using commerce, from the 25 Geo. 3. c. 44: and that it was expedient that other and more convenient provisions should be made for the regulating insurances on ships; and that those contained in the said act, &c. Now, we are bound to say that this second statute must receive the most liberal construction that the words will bear.

[106] 4. HIBBERT V. MARTIN. M. T. 1808. N. P. 1 Campb. 538. S. P. DICKSON v. LODGE. 1 Stark. Rep. 226.

It has been held that the former strictness is not essential, and therefore that a firm may be described as A. B. and Co.; In the policy the plaintiffs were denominated the trustees of Messrs. Keightley, Ferguson, and Co., and a deed was put in which proved that they acted in that capacity. In one set of counts the interest was laid in the plaintiffs, and in another in J. E. Keighley. It was objected, that the policy was void, 28 Geo. 3. c. 56. s. 1; whereby it is required that there shall be inserted in every policy of insurance the name or names, or the usual style and firm of dealing, of one or more of the persons interested in such insurance, or of the consignor or consignees of the property insured, or of the person or persons residing in Great Britain who shall receive the orders for and effect such policy, or of the person or persons who shall give the order or direction to the agent or agents immediately employed to negotiate or effect the same. But the description of the trustees of Messrs. K., F., and Co. could not be considered the usual style and firm of dealing of the plaintiffs, who were the persons really interested, nor satisfy any of the other words of the statute.

Lord Ellenborough. I think it may be considered their usual style and firm of dealing for this purpose. See *Wolff v. Horncastle*, 1 B. & P. 316; *Bell v. Gilson*, ib. 343.

5. BELL V. GILSON M. T. 1798. C. P. 1 B. & P. 345.

And that an insurance broker is a competent agent with in the meaning of the statute.* In this case the policy was effected by insurance brokers, who stated themselves in the policy to have effected it as agents; and it was averred in the declaration, that they were the persons residing in Great Britain who received the order for and effected the insurance, but it did not appear that they were in any other instance the agents of the party interested; it was objected that a mere broker was not within the description of persons mentioned in statute 28 Geo. 3; and that by the expression "as agents" used in the policy the underwriter had been deceived, since he might have been led to suppose that the brokers were the general agents of the plaintiff, which they did not appear to have been. But the Court overruled the objection, conceiving that the intention of the legislature had been satisfied by inserting the names of the persons immediately employed to effect the policy.

6. WOLFF V. HORNCASTLE M. T. 1798. C. P. 1 B. & P. 316.

And it seems that a subsequent adoption by a principal of an insurance effect A. having consigned a cargo to B. transmitted the bills of lading to C. (i. e. A.'s) general agent, with directions to deliver them to B., in order that B. might insure the cargo; shortly afterwards A. drew a bill of exchange on B. for the amount of the cargo in favor of C., and remitted the same to C. to * And so where general agents, to whom goods were transmitted with the bill of lading and a letter directing an ultimate consignment to other persons, that they might have an opportunity to insure, forwarded the goods as directed, and on their being rejected by the proposed consignees, effected an insurance upon them themselves, which was afterwards approved of by the principal, they were held to have satisfied the statute by inserting their own names in the policy; *Wolff and others v. Horncastle*, 1 B. & P. 316.

procure acceptance; B. refused to accept the bill of exchange, and returned [107] the bills of lading to C., who thereupon caused an insurance to be effected on the cargo in his own name, and having informed A. of what he had done, A. approved of it. A loss happened. In an action on the policy it was averred in the declaration that the interest was in A., and that C. made the insurance as his agent, and for his use and benefit, and that at the time of making it C. resided in Great Britain. The Court held, that C. fell within the description of persons mentioned in the statute. 1. He might be considered as the consignee, inasmuch as he was the general agent of A., and had in his possession the bills of lading which had been returned by B., the original consignee. 2. He might be considered as the person who had received the order to insure; for the subsequent approbation of A. was equivalent to a previous order; and consequently the policy was well effected in the name of C. ed by an agent is sufficient to constitute his authority;

7. *BELL v. JANSSEN*. H. T. 1815. K. B. 1 M. & S. 201.

The plaintiffs declared on a policy of assurance, and averred that they were the persons residing in Great Britain who received the order for and effected the assurance. The policy was produced, which was dated and subscribed on behalf of the defendant, on the 27th March, 1810, and contained the memorandum of the 30th, as described in the declaration, signed also by the defendant. It appeared that the memorandum had been procured by the plaintiffs on the 30th, in consequence of a letter received by them on that day from Mr. Bell in Virginia, dated the 26th January preceding, which apprized them of his having purchased the ship *Herald*, and that he should load her with a cargo to their address, and requested them on the receipt of that letter to make assurance on the ship and cargo against all risks in the same manner as done in late similar cases (specifying the particulars of the insurance). The plaintiffs relied on this letter as proving their allegation, "that they were the persons who received the order for effecting the assurance," which assurance, although effected on the 27th, they contended was not completed until the memorandum was added, which was after the receipt of the letter. But an act cannot be construed into an adoption of that which the party knows nor anticipates at the time; and therefore a letter directing an agent to effect an insurance cannot be deemed an adoption of one already effected.

Lord Ellenborough, C. J. was of opinion that the policy must be considered as having been completely effected on the 27th, the memorandum being only in the nature of a declaration of the interest previously insured; and that as the plaintiffs had alleged in their declaration that they were within one of the description of persons mentioned in the statute 28 Geo. 3. c. 56. they were bound to support that allegation by proving a previous order.

Per Cur. The letter of the 30th, could not be considered even as an adoption of the insurance; for at the time when it was written the party was not aware of the insurance having been effected; and a person could not be said to adopt a thing of which he knew nothing at the time.

8. *ARANGELO v. THOMPSON*. H. T. 1811. 2 Campb. 620. K. B. & C. P. [108] To prove the ship to be a Dane, the evidence was, that the captain when at Trieste, addressed himself to the Danish consul there; that when he left that port he carried Danish colours; and that when he was brought into Venice he had still the same colours, with the French flag flying over them. It was contended, that the acts of the captain were no evidence to show to what country the ship belonged. He might have various reasons for passing as a Dane, although he belonged to one of the belligerent powers. Therefore, some documents should be produced, or some witness called to prove that the warranty had been complied with. The agent must be a person resident in Great Britain, a letter dated a broad, directed to A., bearing the English ship letter mark is evidence that A. is such a person.

Lord Ellenborough. I think the acts of the captain are *prima facie* evidence for the owner of the goods, to show to what nation the ship belonged. The circumstance of the ship carrying Danish colours when she was captured would have very little weight, as, in the moment of danger, any strange flag might be hoisted for the purpose of deception; but from the captain having carried Danish colours when he sailed securely from the port of Trieste, and having there addressed himself to the Danish consul, and conducted himself as the master of a Danish ship would have done, I conceive there is fair

group for the jury to infer that the ship really was Danish, according to the warranty.

9. *MELLISH v. BELL*. H. T. 1812. K. B. 15 East, 4.

It need not be stated in the declaration that the provisions of the statute have been complied with.* A declaration, stating that the plaintiffs (M. and another) caused to be effected a policy containing that J. G. and Co. did make assurance, and averring the interest in J. W. S. with a promise by the defendant to the plaintiffs, in consideration of the premium paid by them, was held good after verdict; for it must be intended that the plaintiffs insured under the names of J. G. & Co. and that they were proved to be within one or another of the descriptions of persons in the stat. 28 Geo. 3. c. 56. in whose name or usual style or firm of dealing assurance may be made.

3d. *Description of the master and ship.*†

1. *LE MESURIER v. VAUGHAN*. E. T. 1805. K. B. 6 East, 382.

[109]
It had been said, the name of the ship ought to be inserted; but even then if misnamed, it was not, in the absence of fraud, fatal.

This was an action on an insurance on goods described by the policy to be on board the American ship *President*, the real name being *The President*; but the broker, having been directed to insure the ship *President*, and to designate her an American ship, had by mistake described her as above. The Court were of opinion that the whole was to be taken as her name, and not as a warranty of her being an American ship called *The President*. And it was also holden to be no variance that the real name of the ship was *The President*; the identity of the ship meant to be insured with that name being proved, and no fraud being imputed to the transaction. And in delivering the opinion, Mr. Justice Lawrence read a note of a case decided by Lord Chief Justice Lee at Guildhall, exactly in point. The insurance there was made on "the *Leopard*, or by whatsoever name, and whereof was master for that voyage A. B. or whosoever else should be master." Upon the evidence of A. B., it appeared that this ship was called the *Leonard*, and was never called the *Leopard*. But the Lord Chief Justice was of opinion, that it was only necessary to prove the identity, which was done by captain A. B.

2. *KEWLEA v. RYAN*. T. T. 1794. C. P. 2 H. Bl. 343.

But now it is unnecessary, because an insurance may be effected on "ship or ships."

On the 24th of May, 1793, Freeand and Rigby, merchants at St. Vincent's, wrote to the plaintiffs, merchants at Liverpool, who were also partners in a house of the same name at Grenada, requesting them to get 1260*l.* insured on 70 bales of cotton, shipped on board the *Elizabeth*, from Grenada to England, and also 1300*l.* on another cargo of cotton and other goods, which they intended to ship on board some other ship that should sail with the first convoy, and therefore directed the latter insurance to be on ship or ships. The plaintiffs accordingly, by their broker, insured 1260*l.* on board the *Elizabeth* in London, and 1300*l.* on board ship or ships, viz. 700*l.* at Liverpool, and 600*l.* in London. The policy for 700*l.* of which the defendant underwrote 50*l.* and on which the action was brought, was at and from Grenada to Liverpool, on any kind of goods as interest should appear, in ship or ships, on account of Freeand and Rigby, warranted to sail on or before the 1st of August, 1793, and to return 3 per cent. if the ship sailed with convoy bound to Great Britain, and arrived, &c. without any exception of the goods on board the *Elizabeth*. The policy for 600*l.* effected in London, was also on ship or ships at and from Grenada to Liverpool, but with an exception of 1260*l.* on 70 bales of cotton per

* And the law of England does not require that the character of the person whose name is inserted in the policy shall appear on the face of the contract; the statute 28 Geo. 3 merely says that the party named shall answer one of the descriptions there mentioned, not that the description itself shall be stated on the policy, *Wolff v. Horncastle*, 1 B. & P. 316. But if the declaration states that the person whose name is inserted in the policy answers a particular description (for instance, that he was the person who received the order for the insurance), the averment though unnecessary, must be supported by proof, and cannot be rejected as wholly immaterial; *Bell v. Jansen*, 1 M. & S. 204. When a plaintiff, who had introduced an averment into the declaration that the policy was effected by a certain person as agent, &c. closed his case without giving the necessary evidence of that fact, but the defendant had agreed to admit the subscription to the policy, which was conformable to the averment, Lord Ellenborough, C. J., allowed the plaintiff to go into further proof; *Dickson v. Lodge*, 1 Stark. Rep. 226.

† The captain or master need not be named. See Park on Ins. 20:

Elizabeth, Creltin, the same underwriters in London having before subscribed the policy on the Elizabeth. But the plaintiffs did not communicate to the underwriters at Liverpool the letter of Freeland and Rigby, directing an insurance on the Elizabeth, nor any circumstance respecting the goods shipped on board the Elizabeth, and the insurance made on that ship. The Elizabeth sailed early in June, and arrived safe at Liverpool in August, 1793. The Heart of Oak, on board of which Freeland and Rigby had shipped their second cargo of cotton, &c. sailed the latter end of July, bound for Liverpool, but with a design formed before the commencement of the voyage (as appeared by clearances, and was admitted on all sides) to touch at Cork in her way to Liverpool, but was totally lost before she arrived at the dividing point. The defendant pleaded the general issue, and a tender of 1*l.* 10*s.* on account of the safe arrival of the Elizabeth, which plaintiff took out of court, and obtained a verdict for 48*l.* 19*s.* A rule having been obtained to show cause, why there should not be a new trial on several grounds, the Court discharged the rule, declaring as to this point, that the legality of the policy on ship or ships was too established, both by usage and authority, to be disputed. As to the second, that the assured had clearly a right to apply such an insurance to whatever ship he thought proper within the terms of it. [110]

4th. Description of the property insured.

(a) On ships.

1. The subject matter of the insurance ought to be inserted in the policy, that is, whether it be ship, goods, freight, &c. ; but it is not necessary that the particular kind of goods should be specified. The property insured should be accurately described;

2. HALL v. MOLINEUX. 6 East, 385; S. C. 2 Smith, 495.

An insurance was made upon a ship called the Leopard, "or by whatsoever other name or names the same ship should be called," whereof was master for that voyage A. B. ; and upon the evidence of A. B. it appeared that the ship of which he was master was called the Leonard, and was never called by the name of the Leopard. It was holden by Lee, C. J., that by reason of the general words, "by whatsoever name," it was only necessary to prove the identity, which was done here by A. B., who said that he was master of the Leonard. But a misnomer of the ship is immaterial.

3. LE MESURIER v. VAUGHAN. E. T. 1805. K. B. 6 East, 382.

A broker had received instructions to insure goods on board an American ship called the President, but by mistake had stated it in the policy all as one name of a ship, called "the American ship President," instead of stating it as part name and part description. The Court held, that the general words, or "by whatever other name called," had cured the mistake, the identity of the ship in which the goods were lost with that in which they were insured for the voyage being proved, and it not appearing that the underwriter could be prejudiced by the mistake. As "President" for "The President."

4. LE MESURIER v. VAUGHAN. E. T. 1805. K. B. 6 East, 385, 386.

Per Lord Ellenborough, C. J. Certainly a true description both of the name of the ship and of the voyage intended should be observed to the extent which the terms of the policy itself require. But the framers of this policy, contemplating that there might be a mistake in the name given to the ship, have added these words, "or by whatever other name or names the same ship should be called;" they have therefore provided for the event which has occurred, of a mistake in the name. It is said, however, that giving effect to those words will introduce fraud, and will prejudice the underwriters; but whenever such a case occurs we shall deal with it accordingly. [111]
At least, in the absence of fraud or prejudice to the insurer.

5. CLAPHAM v. COLOGAN. E. T. 1813. K. B. & C. P. 3 Campb. 382.

The policy was originally filled up on the Three Sisters, at and from Cadiz and Seville to Liverpool. After it had been signed by the underwriters the broker inserted the words "Tres Hermanas, or," and "both or either." Several of the underwriters put their initials to the alteration, but the defendant refused so to do. When the broker effected the policy he merely called the ship the Three Sisters, without making any representation as to the coun- The insertion of an English name in the policy does not amount to a repre-

sentation
that she is
English.

try she belonged to. In point of fact she was originally a *Dave*, and was purchased by the bankrupt, a merchant at Liverpool, while at Seville. On the adventure in question he changed her name to the *Tres Hermanas*, manned her with a Spanish crew commanded by a Spanish captain, and put her under the Spanish flag: she was lost on the voyage home by the perils of the sea.—On the part of the underwriters it was sworn that if the ship instead of being English, as her name in the policy denoted, had been known to be manned with Spanish seamen, and navigated as a Spanish vessel, it would have made a difference of two per cent. on the premium. Lord Ellenborough, however, held, that under these circumstances the defendant was liable. The mere calling the ship by an English name, he said, could not amount to a warranty or representation that she was English; she might have been an American, or an English prize preserving her original name, or a ship built on the continent, whose name was translated into English.

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6. *LOTHIAN V. HENDERSON*. T. T. 1803. House of Lords. 3 B. & P. 499. Policy of insurance on goods on board the *Catherine*, an American vessel; after the policy was effected, doubts having arisen whether the policy contained a warranty, the underwriters signed an agreement, that in case of capture or seizure the assured, before they claimed for a loss, must produce proofs of the ship being American bottom, and by bills of lading show that the cargo had been shipped on account and risk of A. B., upon which they would settle by granting bills at four months for the amount of their subscriptions in full, depending that the insured would use their best endeavours to recover the property as for account of the shippers.

Per Cur. The question which your lordships have been pleased to propound to the judges appears to me necessarily to involve these objects for consideration; the legal meaning and effect of the policy of insurance, of the sentences of condemnation by the several Courts of Admiralty in France, and of the memorandum of agreement subscribed by the underwriters of the 20th April, 1797. If, on mature consideration, we had been able to concur in opinion on the meaning of the subsequent agreement, and our opinion had been unanimous in favour of that construction contended for at the bar by the counsel for the respondents, the assured, it might perhaps have been superfluous to have entered into the consideration of the two first points, viz. the meaning and effect of the policy and of the sentence; because if, as the assured insisted, the subsequent agreement meant to exclude from the proofs in the cause any sentence which might be made in any Court of Admiralty, or prize, or to give to the words of the policy a different construction from that which the instrument on the face of it imports; we say, if that had been the clear effect of the agreement, it would have taken this case out of the general rules of law as applicable to cases resting solely on a policy and sentence of condemnation such as appear in this case. But inasmuch as we have not been able to arrive at the same conclusion, in our several modes of construing this argument it may be thought right, at least for such of us as may happen to dissent from the construction put on it by the counsel for the assured, to offer to your lordships our opinion on the effect of the policy and sentence, which in our view of the memorandum becomes material to be considered, in order to furnish an answer to the question submitted to us. It has scarcely been denied at the bar that the terms of this policy "of or in the good ship or vessel called the *Catherine*, an American vessel," amount to an express warranty of the ship being American, which was a neutral nation in the war; nor could it have been otherwise contended, after the uniform current of authorities in which such an averment has been decided, or taken for granted to be a warranty, as much as if the word warranted had been inserted in the policy; for we take this to be an established proposition, that every positive averment or allegation on the face of the instrument and making a part of the written contract whether inserted in the body of it, or written in the margin in a line with the body of the instrument, or transversely, amounts to a warranty on condition; and if such allegation or stipulation be not strictly true, the assured cannot recover

on the policy, to whatever cause the loss be owing, whether the loss be connected with the subject of such warranty or wholly independent of it; for it is a condition by which the contract is to take effect, which failing, the contract fails. Such being the effect of the allegation in the policy, "an American vessel."

7. *Kewley v. Ryan*. T. T. 1794. C. P. 2 H. Bl. 343.

A policy of insurance is effected on certain goods on board a certain ship, on a voyage at and from A. to B., and another policy is also made on any kind of goods, as interest should appear, on board ship or ships, in the same voyage, warranted to sail within a limited time, but no circumstances relating to the first policy are communicated to the underwriters of the second, nor do they know that the first was made. Goods to the full amount of the sum insured in the first policy are put on board the specified ship, which arrives in safety. Goods also to the full amount of the sum insured in the second policy, are put on board another ship, which sails within the time limited from A., with an intention to touch at C. in her course to B., but is lost before she arrives at the deviating point.

The Court, consisting of the Lord Chief Justice, Mr. J. Heath, and Mr. J. Rooke, declared their opinion as to the first point which had been made in the argument, that the legality of the policy on ship or ships was too well established, both by usage and authority, to be disputed.

8. *Brough v. Whitmore*. H. T. 1791. K. B. 4 T. R. 206.

While the ship was lying off Bank Saul Island, in the River Canton, it became necessary to refit her; for which purpose the stores and provisions were taken out of her, and put into a warehouse, called a Bank Saul, and that while they were in the warehouse they were destroyed by an accidental fire. It was admitted that the policy covered all the articles but the provisions, which were merely for the use of the ship's crew; but if those provisions were not protected by the policy, then there was not an average loss of 3l. per cent. It was considered in the same light as if the accident had happened on board the ship; 1 Burr. 341. For the defendant it was contended, that the provisions were not protected by the insurance; but one of the jury said that it had been determined in Lord Mansfield's time that they were included under the word "furniture," under which decision the merchants in the city had since acquiesced; on which the plaintiffs obtained a verdict.

Per Cur. We are clearly of opinion that the underwriters on the body and furniture of the ship are liable to pay the amount of these provisions, which were bought to replace those which were consumed by an accident within the meaning of the policy. Without commenting on the words of the policy, it is sufficient to say that the policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument, but it is founded on usage, and must be governed and construed by usage. Now it is perfectly clear, that in every instance where losses have been settled, the provisions put on board the vessel when she sailed have been considered as part of the ship. The value is taken in this way: the underwriters have a right to go and see the ship, to examine the value of the hull, the masts, and the provisions: the value of the ship alone comprehends all these articles; but though the underwriters have a right to examine the ship itself, in point of fact they do not, because they know, from experience, the quantity of provisions necessary for the crew for the intended voyage; and if that value be stated to them in the ordinary way, they sign their names immediately without making further inquiries. Then if the provisions be included in a policy on the ship, and the ship and all the provisions be lost, the underwriters must make good the whole loss, whether it be a valued or an open policy. But it has been said that if an accident happen after some of the provisions are consumed, the underwriters are entitled to a deduction to the amount of such provisions. We will answer this first, as the argument applies to a valued, and then to an open policy. As to the first, from the nature of the policy the provisions are not insured against all events; they are only insured against particular risks. Again, there is nothing

[114] ing from which there can be salvage; if the body of the ship and every thing on board be sunk or burned, there can be no salvage; and in case of an open policy the insured must prove by evidence what was the value of the whole, and then the same reasons as apply in the case of a valued policy. With respect to the case of *Robertson v. Ewer*, which has been relied on, we thought at first that it applied strongly to the present, and if we still entertained the same opinion, we would not, on account of any usage to the contrary among underwriters, overturn a solemn determination of this Court; but that case, and the two others there mentioned, are clearly distinguishable from the present. In all those the insured wished to charge the underwriters with the amount of the provisions consumed during the time when the ships were detained; of those, therefore, it is sufficient to say, that an insurance is on the ship for the voyage; but during a detention the ship is not proceeding, and, therefore, the underwriters are not liable. This case also differs from that of *Robertson v. Ewer* in another circumstance; there the provisions were consumed by the slaves on board, and not by the ship's crew; and the slaves are considered as part of the cargo. The words of Lord Mansfield in that case must be taken with a reference to the case then before him. He was then speaking of a charge for provisions used during the voyage and for the maintenance of the slaves; and he said, "There is no authority to show, that on this policy the insured can recover for such a loss; but it is contrary to the constant practice." Then he proceeded to say, "On a policy on a ship, sailors' wages or provisions are never allowed in settling the damages." Now even if these latter words are taken in a general sense, and not confined to the case immediately before the Court, they are accurate; for "provisions" *eo nomine* are not taken into consideration. In general, the captain of a ship takes on board provisions sufficient for the voyage, and if he be detained in any port, and he be a prudent man, he will not use what are called the ship's detention, but he will buy others for immediate consumption during his detention; because he cannot but know that he has the same length of voyage to perform that he had before he was detained; it makes no difference, however, to the underwriters, whether he do so or not; for if the captain be obliged to purchase other stores for the remainder of the voyage the underwriters are not answerable for these, but only for those which were on board at the time of the insurance, since they only formed a part of the value of the ship. On the whole, therefore, we are of opinion that there should be no new trial.

See 8 East, 375.

9. *ROBERTSON V. EWER.* H. T. 1786. K. B. 1 T. R. 127; *EDEN V. POOLE.* H. T. 1786. K. B. 1 T. R. 132. n.

Yet the term does not extend [115] to seamen's wages and provisions expended during a detention under an embargo.*

The ship sailed on her voyage to the coast of Africa, at which place she took in a cargo of slaves, and proceeded from thence to the island of Barbadoes, where she arrived on the 18th of December, 1781. It appeared that an embargo had previously been laid on all shipping by Lord Hood, the commander-in-chief upon that station. That, notwithstanding this, the captain of the *Dumfries* attempted to sail on the 21st of December, 1781, but was prevented; on this application was made by him for permission to sail, which being refused, a few days afterwards he sailed without leave, and thereupon Lord Hood dispatched the *Salamander* sloop of war in chase of the vessel, which brought her back, after a trifling engagement, the damage being less than three per cent. upon per cent. Upon her return, Lord Hood, in consequence of this breach of embargo, ordered all the men to be taken out and dispersed on board his Majesty's ships of war. That the embargo continued till the 7th of January, 1782. That on the 22nd of the same month, the small-pox broke out amongst the slaves, who were all obliged to be put on shore, in consequence of which, and for want of mariners to navigate the vessel, she was detained at Barbadoes above two months after the embargo was taken off; the ship then sailed to Jamaica, which was her last port of discharge. This ac-

* As to policies on vessels employed in the whale fisheries; see 8 East, 375, 376; and 3 B. & C. 157.

tion was brought to recover the amount of wages and provisions in consequence of her detention under the embargo at Barbadoes.

Butler, J. I take it to be perfectly well settled that the insured cannot recover seamen's wages or provisions on a policy on the body of the ship; those are not the subject of the insurance. The case put by the plaintiff's counsel proves the rule; for if the ship had been detained in consequence of any injury which she had received in a storm, though the underwriter must have made good that damage, yet the insured could not have come upon him for the amount of wages or provisions during the time that she was so repairing. Here the ship itself was safe, and the Court only look to the thing itself which is the subject of insurance, and the wages and provisions are no part of the thing insured.—Rule discharged.

(b) *On freight.*

1. *LUCENA v. CRAUFORD*. M. T. 1806. C. P. 269. 2 N. R.

Per Cur. Where the subject-matter of the insurance is freight it should be specifically stated in the policy.

2. *TAYLOR v. WILSON*. E. T. 1812. K. B. 15 East, 327.

The defendant subscribed the policy and received the premium of eight guineas. The plaintiffs were owners of the ship John; and on the 5th of Sept. 1808, the plaintiff Taylor, who was the master of the vessel (and who is so stated to be in the policy), on behalf of himself and the other owner, Charles, chartered the vessel; and by the charter-party she was to proceed from Newcastle to Lisbon with coals, and from thence to St. Ubes, in Portugal, and there take in a cargo of salt for Gottenburgh, in Sweden. The plaintiff Taylor proceeded as master with the vessel to Lisbon, and there delivered the coals, and arrived at St. Ubes in December, 1808, and there loaded 360 tons of salt to be carried to Gottenburgh. The freight for each keel of coals to be delivered at Lisbon was 50*l.*, and for each ton of salt was 5*l.*; and the plaintiff Taylor, as master, signed bills of lading for the salt which was to be carried to Gottenburgh. The bill of lading was for Gottenburgh, Portsmouth, and one of the places from where convoys were appointed to go to Gottenburgh, and other ports in Sweden; and it was the intention of Taylor, the master, to proceed from St. Ubes with the vessel to Portsmouth, on her way to Gottenburgh. No communication was made to the underwriters that the vessel was to go to Gottenburgh. On the 25th of January, 1809, the vessel, with the salt on board, sailed from St. Ubes for Gottenburgh; and on the 14th of February, and before her arrival at Gottenburgh or Portsmouth, she was lost by the perils of the sea. If the plaintiffs were entitled to recover, the verdict was to be entered for 100*l.*, otherwise the nonsuit was to remain.

Per Cur. The only question is, whether a freight voyage may be insured part of the way? This was a voyage to Gottenburgh by the way of Portsmouth, and the freight was to be earned at Gottenburgh. There might be a greater peril in the first part of the voyage than in the other, which might have induced the plaintiffs to insure the first part. They did not deceive the underwriter when they insured their freight from St. Ubes to Portsmouth; they did not tell him that the freight was to be earned there, but only that it was an insurance on freight in that voyage. There is no doubt that a party may insure his ship and goods during part of a voyage, and we cannot conceive why he may not also insure freight in the same manner. There is no case which intimates the contrary, except that of *Musdoch v. Potts*, at Nisi Prius, which was never brought before the Court, and is inconsistent with all the other cases; except that opinion, there is nothing to distinguish an insurance on freight in this respect from an insurance on ships or goods for a part of the voyage. There is no foundation for saying that a voyage is not divisible as a subject of insurance.

3. *EVERTH v. SMITH*. H. T. 1814. K. B. 2 M. & S. 278.

Policy on freight valued at and from R., and any ports in the Baltic, to any ports in the United Kingdom, and the ship was chartered to sail with a cargo from L. to some port in the Baltic or not beyond R., and from thence to R.,

Where the subject matter of the insurance is freight, it should be specially stated in the policy. It may be for the whole or a part of the voyage, or for a specified time.

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If freight be insured generally, and the insurance be not of a specific freight though the adventure be protracted

ed by one of the perils insured against yet if the ship ultimately bring home a cargo from the port in question, there has been no loss of freight.

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there to take in a homeward cargo, &c, she sailed from L., and arrived at R., where she was detained for five weeks, and prevented from loading by order of the government, and the freighter never loaded her, and a few days after the detention ceased the frost set in, which detained her there till the spring, when she procured a freight from other persons, and returned with it to L., but the expenses of her detention exceeded such freight. The only question made was respecting the recovery of the freight, whether this was such a loss as to entitle the assured to recover. The only way in which it was treated as loss was, that the ship, on account of her carrying a Rostock flag, was not considered by the government at Riga as a ship which ought to be permitted to take on board a cargo, and notice was given to the captain that he was not to be allowed to load; his papers were not returned to him, and being thus unable to take in her cargo, the ship was detained at Riga for five weeks; the agent of the assured could not load on account of her detention, and being under a Rostock flag; the frost set in on the 30th of October, so that there was a period of a few days after the detention ceased before the frost began. The ship remained there the winter, and never received a loading from the charters; but in the spring procured another loading, with which she returned home and earned her freight, but the expenses incurred by her stay exceeded such freight. It was contended under these circumstances that this amounts to a total loss of the freight.

Per Cur. Before we pronounced our opinion we wished to look into the cases, particularly those of *Anderson v. Wallis*, and *M'Carthy v. Able*; and on reference to those cases we find ourselves confirmed in the opinion we entertained upon the argument, that this is not a case of loss recoverable under the policy. This was an insurance on freight generally, not on any specific freight. The charter party is only material to show that, upon the ship's arrival at Riga, there was an inchoation of the risk: the underwriter did not insure that any particular freight should be brought home; but if any freight is brought home a loss has not happened for which he undertook to indemnify the assured. In this case the only inconvenience that has arisen is to be attributed to the protraction of the adventure; but that was decided, in *Anderson v. Wallis*, and *M'Carthy v. Able*, not to constitute a loss. On the authority of the above cases, as well as upon general principles of laws, it appears to us that the mere retardation of the adventure, and the consequent inconvenience and expense arising from it, are not a substantive cause of loss.—Where the particular thing insured has not received damage, and whether the freight earned be the particular freight contracted for by the assured or a posterior freight, makes no difference; if freight has been fully earned, there can be no loss properly demandable of the underwriters.

(c) *On goods.*1. *DA COSTA v. FRITH*. M. T. 1766. K. B. 4 Burr. 1966.

The usual words in a policy describing goods and merchandizes include coins and and jew els.*

A policy was underwritten by the plaintiff, being an insurance upon any of the packet-boats that should sail from Lisbon to Falmouth, or such other port in England as his Majesty should direct his packets appointed between Lisbon and England, for one whole year, commencing 1st of October, 1763, and to continue to the 1st of October, 1754, inclusive, upon any kind of goods and merchandizes whatsoever; and it was agreed that the goods and merchandizes should be valued at the sum insured on such packet-boat, without further proof of interest than the policy; and to make no return of premium for want of interest, being on bullion or goods. And in case of loss or misfortune, the insured were to be at liberty to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandizes, or any part thereof, without prejudice to the insurance; to the charges whereof the insurers were to contribute, each one according to the rate and quantity of his sum insured. The consideration paid by the insured was 10l. per cent., and in case of loss they were to abate nothing. *N. B.* Corn, fish, salt, flour, and

* See 26 Geo. 3. c. 86. s. 3. as to liability of masters; and *ante*, tit. Carriers.

seed. were warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under 5l. per cent., and all other goods free from average under 3l. per cent., unless general, or the ship should be stranded. In April, 1765, the iron trunk which contained all the bullion was fished up, and thereby all the bullion recovered, without any loss or prejudice whatever, and delivered to the defendant. The defendant's expense of salvage amounted to 63l. 8s. 2d., and deducting that sum for salvage, the net proportion of his share came to 206l. 11s. 9d. The plaintiff's proportion thereof in respect of his subscription amounted to 48l. 4s., which was paid into court. The question was, whether the plaintiff upon this case was not entitled to recover in this action? The Court agreed that this was a policy of a peculiar sort, and within the exception of the stat. of 13 Geo. 2. c. 37. It is a mixed policy; partly a wager-policy, partly an open one; and it is a valued policy, and fairly so, without fraud or misrepresentation; therefore, the loss having happened, the insured is entitled as for a total loss. The insurer agreed to the value, and is concluded to dispute it. The insured has received the money as for a total loss, and there is no want of conscience in retaining it. The cases of Lewis and another v. Rucher, Hamilton v. Mendes, and Goss and another v. Withers, were only "that where the average loss appears before adjustment, the underwriter shall pay only the real damage." And the reason is, that the insured must show the whole case as it then stood. In the present case there was a total loss at the time of the adjustment; the adjustment in this case makes an end of the question. Here is a solemn abandonment and a solemn agreement, "that the insurers shall be content with salvage in such proportion as the sum insured bears to the whole interest." Here was a total loss at the time of the adjustment (which is the same as if the damages had been then recovered in an action). Here is no sort of fraud, nor any thing that is against any law; and to refund more than in that proportion would be contrary to the underwriter's own agreement. Therefore, the net proportion only, in respect of the plaintiff's subscription, after deduction of salvage, ought to be returned to him, and that is paid into Court.

2. THOMAS v. ROYAL EXCHANGE INSURANCE. 1815. Manning's N. P. Index, 114.

Dampier, J. Bank notes are not the subject of insurance.

3. ROSS v. TWAITE. — 1 Park. Ins. 25. S. P. BACKHOUSE v. RIPLEY.

But not
Bank notes
[119]

— id. This action was brought upon a policy of insurance of the captain's goods for six months certain. The loss proved was chiefly for goods lashed on deck the captain's clothes, and the ship's provisions. It was proved by an underwriter and a broker, that none of those things are within a general policy on goods, for the risk was greater as to goods lashed on deck than other goods; and a policy on goods means only such goods as are merchantable, and a part of the cargo. They also swore, that when goods like the present are meant to be insured, they are always insured by name, and the premium is greater. Lord Mansfield said, he thought it consistent with reason, and understood the usage to be so; therefore he advised the plaintiff to withdraw a juror, the premium having been paid into court, to which he consented.

4. DA COSTA v. EDMUNDS. M. T. 1815. N. P. 4 Campb. 142.

Policy on 40 carboys of vitriol. They were carefully stowed on deck, but caught fire, and were necessarily thrown overboard during the voyage. Carboys of vitriol are sometimes stowed on the deck, and sometimes bedded in sand in the hold, where they are considered safer. Lord Ellenborough left it to the jury to say whether it was usual to carry vitriol on deck, and whether those carboys were properly stowed. If there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it without any communication; and all they could require was, that these carboys should be properly stowed in the usual manner. On the other hand, they were not liable if the

Which

And the words "goods and merchandise" apply only to the cargo actually on board the vessel; however may be stowed on deck, and of the nature of the commodity.

Or jewels or ornaments worn by passengers; Marsh Ins. 320.

goods were carried on the deck without such a usage, or if they were not stowed there in a skilful and proper manner.

(d) *In lien or special interest.*

GODIN v. LONDON ASSURANCE COMPANY. H. T. 1758. K. B. 1 Burr. 489. S.

P. GLOVER v. BLACK. E. T. 1760. K. B. id. 1401.

The usual form of policy will cover goods on which the insurer has only a lien.

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The question strongly litigated here was, whether the plaintiff ought to recover his whole loss or only half, it being objected that there was a double insurance. A verdict was found for the whole, subject to the opinion of the Court; and if the Court should think, upon his lordship's report, that the plaintiff by law ought to recover for half his loss only, then the verdict to be entered up as for half. Lord Mansfield delivered the opinion of the Court. He began with stating the facts, as they appeared to him at the trial, which were these:—Mr. Meybohm, of St. Petersburg, had dealings with Mr. Amyand and Company, of London, who often sent ships from London to Mr. Meybohm at St. Petersburg. Meybohm, as appeared by the evidence, was indebted, on the balance of their accounts, to Amyand and Co. Amyand and Co. sent a ship called the Galloway, Stephen Baker, master, to Mr. Meybohm at St. Petersburg, to fetch certain goods. Meybohm sent the goods, and promised to send the bill of lading by the next post, but never did. Afterwards (viz. in August, 1756,) Amyand and Co. got a policy of insurance, from private insurers, for 1100*l.* on the ship, tackle, and goods, at and from London, to St. Petersburg, and at and from thence back again to London, which policy was signed by several private underwriters, quite different from the present defendants, and of this sum of 1100*l.* thus underwritten, 500*l.* were declared to be on eleven sixtieth parts of the ship, and the remaining 600*l.* to be on goods. Between the 26th of August and the 28th of September, 1756, both included, Mr. Amyand insured 800*l.* more with other private insurers, and this latter insurance was upon goods only, and was only at and from St. Petersburg to London. On the 28th, 29th, and 30th of October, 1756, Mr. Amyand insured 900*l.* more with other private insurers, which last insurance was on goods only at and from the Sound to London; so that the whole sum thus insured by Amyand and Co. was 2,800*l.* of which 2,800*l.* the sum of 2,300*l.* was on goods, the remaining 500*l.* was on the ship. Several letters being given in evidence, it appeared that Meybohm wrote from St. Petersburg on the 7th of September 1756, (the date of this letter on this subject,) to Amyand and Co. and mentioned what goods he should send to them, referring to the invoice for the particulars, and directed them to get insurance thereon, and to place the goods and insurance to a particular account, which he named in his letter, in which he also specified some iron, which was for Mr. Amyand's own account. This letter Mr. Amyand afterwards received, probably about the 27th of October, and, in consequence of it, made the insurance accordingly upon the 28th, 29th, and 30th of the same October as before mentioned. Meybohm having shipped the goods indorsed the bills of lading to one Mr. John Tamesz, in Moscow, the plaintiff, in effect, in the present action, who, on the 7th of October, 1756, wrote to his correspondent, Mr. Uhthoff, here in London, to insure these goods. In this letter he desires Mr. Uhthoff to insure the whole, that he (Tamesz) might be safe in all events; for he suspected that these goods were intended to be consigned by Meybohm to somebody else, and perhaps might be insured by some other persons; and he says they were transferred to him in consideration of his being in advance to Meybohm more than their amount. This letter from Mr. Tamesz, with these directions to insure, was received by Mr. Uhthoff on the 15th of November, 1756. Mr. Uhthoff accordingly applied to the defendants, the London Assurance Company, and disclosed to them at the same time all these particulars, and they, upon the 10th of November, 1756, after being thus apprised that there might be another insurance, made the insurance now in question for 2,316*l.* on the goods on the voyage. Mr. Uhthoff's insurance was made by the plaintiffs, Godim, Guion, and Co., who are insurance brokers, and they declare that this insurance, which is expressed to be made by them, as well in their own names as

for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, was made by order of Henry Uthoff, Esq. This declaration is indorsed upon the policy, and is dated the 18th of November, 1756. There is no doubt as to the value of the goods, or as to the loss of them; and it is admitted by the defendants that the plaintiff ought to recover half the loss from them; but they say they ought to pay only half, not the whole of the loss. So that the only question is, whether the plaintiff is entitled, upon the circumstances of this case, and upon the facts I have been stating, to recover the whole loss from the present defendants, or only the half of his loss from them, and the remainder from the underwriters of Mr. Amyand's policy? The verdict is found for the plaintiff for the whole, but it is agreed to be subject to the opinion of this Court upon the question I have just mentioned. It has been said that the indorsement of the bills of lading transferred Meybohm's interest in all policies by which the cargo assigned was insured, and therefore Jamesz has a right to Mr. Amyand's policy; and that Jamesz, being the assignee of Meybohm, is the *cestui que trust* of it, and may recover the money insured; and even that he may bring trover, or detain, for the very policy itself; and it is urged from hence that he either will or may have a double satisfaction for the same loss. But allowing that by the indorsement of the bills of lading and assigning the cargo to Tamesz, he stands in the place of Meybohm in respect of his insurances; yet Mr. Amyand had an interest of his own, and had actually insured the ship and goods, and the sum of 1900*l.* (upon both together) prior to any directions or intimation received from Mr. Meybohm to insure for him. Various people may insure various interests on the same bottom; as, one person for goods, another for bottomry, &c. And here Mr. Amyand had an interest of his own, distinct from the interest of Meybohm; he had a lien upon these very goods, as a factor to whom a balance was due, and he had the sole interest in the ship, which was a part of the things insured by him. It is far from appearing, "that even his last insurance (in October) was made on the account of Meybohm, or as agent for him." So far from it, Mr. Amyand insists upon it for his own benefit (as he expressly declared at the trial,) and absolutely refuses to give it up, or to suffer his name to be used by the plaintiff; that he was a witness for the defendant, and was produced by them, and inclined to serve them; so that the foundation of this argument, urged by the defendant's counsel, fails them; and there is, in reality, nothing to support it. But even supposing "that Mr. Amyand had made his insurance, not upon his own account, but as agent or factor for Mr. Meybohm, and upon the account of Meybohm;" yet even then Tamesz can never come against Amyand's underwriters, or come at Amyand's policy to his own use. For Mr. Amyand, the factor for Meybohm, has possession of the policy, and appears to have been a creditor of Meybohm's upon the balance of accounts between them at the time when he made the insurance; and I take it now to be a settled point, that a factor, to whom a balance is due, has a lien upon all goods of his principal, so long as they remain in his possession. *Kruier et al. v. Wilcox et al.* was a case in Chancery upon this head. It came on first before Sir John Strange, then Master of the Rolls, who decreed an account, and directed allowances to be made for what the factor had expended on account of the ship or cargo; and reserved all further directions till after the master's report. It came on again afterwards for further directions, after the master's report, before the Lord Chancellor, who was attended by four eminent merchants, who were interrogated by him publicly; after which he took time to consider of it, and on the 1st of February, 1795, decreed "that the factor has a lien on goods consigned to him, not only for incidental charges, but as an item of mutual account for the general balance due to him, so long as he retains the possession. But if he parts with the possession of the goods, he parts with his lien, because it cannot then be retained as an item for the general account." And there was another case in the same court, of *Gardener v. Coleman*, a few months after, in which the former case, determined as I have mentioned, was considered as a point settled; and this latter case of

- [122] *Gardener v. Coleman* was decreed agreeable to it; so that *Mr. Amyand*, even considered as factor or agent to *Meybohm*, and on making the insurance upon *Meybohm's* account, is yet entitled to retain the policy, *Meybohm* being indebted to him upon the balance of the account between them; and he has a lien upon the policy whilst it continues in his possession. Therefore, even in this view of the case, *Mr. Tamesz* must first have paid to *Mr. Amyand* the balance of his (*Amyand's*) account before he could have gotten that policy out of *Mr. Amyand's* hands, and consequently *Mr. Tamesz* was very far from being entitled to the benefit of it as a *cotui que trust*, absolutely and entirely.

See *Gregory v. Christie*; 1 Park on Insurance, 14.

(c) *On respondentia.*

GLOVER v. BLACK. M. T. 1763. K. B. 3 Burr. 1394; S. C. 1 Bl. Rep. 405.

When the insurance is bottomry or respondentia, it must be specifically stated.

Action on a policy of insurance. *Glover* had lent money to *Captain Tryon* of the *Denham*, Indiaman, on a respondentia bond, but insured as for goods; *Captain Tryon* had interest on board equal to the sum insured. The ship was burnt and her cargo; and now the question was, whether an insurance as for goods and merchandize should be valid as for a respondentia interest?

Lord Mansfield, C. J., held it to be sufficient interest in the goods, and that a mortgagee of goods might insure those goods. The 19 Geo. 2. has prohibited the captain (or borrower) from insuring any thing but the surplus above his respondentia bonds. Who must insure the rest? The lender. No fraud can be meant in this case, by not expressing that it was on respondentia, since it is more for the benefit of the insurers to omit than to mention it. In insurances upon respondentia. Proof of the execution of the respondentia bond is sufficient proof of interest in the insured.

(f) *On profits.*

LUCENA v. CRAUFORD. M. T. 1806. C. P. 2 N. R. 269. M. T. 1806. C. P.

An insurance may be effected on profits generally, and may be so described in the policy.

Per Cur. Points arose in *Grant v. Parkinson*, but were not determined; the Court being of opinion that the words in dispute, viz. "profits valued at 1000*l.* without other voucher than this policy," only made it a valued policy, and did not amount to a dispensation from proving interest. They observed, that though the subject of insurance was profit, yet that the risk was, in fact, incurred by ships or goods, upon which the profit was dependant; that the preservation or destruction of which occasioned the profit or loss; and that an insurance upon the profits of any ship or goods, by way of wager, would be a mere evasion of the statute, and, though not within the words, must be taken to be within the spirit.

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5th. *Description of the place at which the vessel is laden and bound to.**

1. *TAYLOR v. WILSON.* E. T. 1812. K. B. 15 East, 324.

The insurance may be for part of an entire voyage.

An insurance on freight from *St. Ubes* to *Portsmouth*, upon a ship which sailed with a cargo from *St. Ubes* to *Gottenburgh*, with intention to proceed first to *Portsmouth*, to take up convoy in her way to *Gottenburgh*, was holden lawful, though the underwriters had no notice, that *Gottenburgh* was the ultimate place of destination of the ship and cargo. See *Maidcock v. Potts, Park*, 599; *Marsh*, 326.

2. *RAINES v. KNIGHTLEY.* T. T. R. B. Skin. 54.

Parol evidence is not admissible to prove that the voyage stated in the policy is different from the one contemplated by the parties.

The case upon evidence was a policy of assurance, drawn from *Archangel* to *Leghorn*; and *assumpsit* being brought upon it, the defendant said, that the agreement before the subscription was, that the adventure should begin first from the *Downs*, but this agreement was not put into writing. It was said this policy is but a mere agreement by parol; but without it be put in writing, it shall be taken that the policy speaks the minds of the parties; for policies are

* And to recover on the policy the ship must have been actually lost; *Thompson v. Royal Exchange Company*, 1 M. & S. 80.

† The policy ought correctly to describe both these particulars, and ought to contain a statement of the different places at which, and purposes for which, the ship is to touch, stay, and trade. If a ship be insured from *London* to ———, and be lost, the policy is void for uncertainty, notwithstanding the underwriters may have had a private communication as to her real port of destination, 1 Park, 27; but the omission would be cured by verdict; *Fitz.* 274; *Barn.* 463.

things well known, and go as far as trade goes, and to suffer them to be defeated by agreements not appearing, is to lessen their credit, and to make them of no value which yet are countenanced by two several acts of parliament. That the party may as well say he is to have ten guineas premium though the policy says but three, as to say he assured but from such a place, *sail the Downs*, when the policy says it was from Archangel. The custom of merchants ought to be proved by those that have had frequent experience and have known cases so ruled. It was allowed that if a ship was laden at Aleppo and came to Messina, that she may be insured; the adventure is to begin from Messina, but then it must be so expressed; nay, it need not be expressed that she was laden at Aleppo, though the opinion of some merchants was so, as Pemberton, C. J., said; but if the insurance was of goods laden at Aleppo, and they were indeed laden at Messina, it might make a difference. And also observed that policies were sacred things, and that a merchant should no more be allowed to go from what he had subscribed in them, than he that subscribes a bill of exchange payable at such a day, shall be allowed to go from it, and say it was agreed to be upon a condition, &c. when it may be that the bill had been negotiated; for, though neither of them are specialties, yet they are of great credit, and much for the support, conveniency, and advantage of trade; and the jury found contrary to the direction of the Court; and afterwards, in Michaelmas Term, there was another trial at bar, and a verdict according to direction for the plaintiff.

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6th. Description of the commencement and termination of the risk.*

7th. Description of perils and risks insured against.†

8th. Description of the premium.

1. DALYELL v. MOIR. M. T. 1808. N. P. 1 Campb. 532.

The defendant had underwritten a policy of insurance, effected by one Reid, an insurance broker, on account of the plaintiff, upon goods by ship or ships, at and from Berbice to Great Britain. This action was brought to recover back the premium, on the ground that the goods had never been shipped; the plaintiff gave in evidence the policy signed by the defendants, which contained the usual acknowledgment on the part of the underwriters, "confessing ourselves paid the consideration due unto us for this assurance by the assured, &c." Lord Ellenborough. The defendant is bound by the receipt in the policy. If a man acknowledges that he has received a sum of money from a broker, and accredits him with his principal to that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him. I should completely knock up the insurance business if I were to allow this acknowledgment to be impeached. It is well known that there are running accounts kept between the insurance broker and the under-

The acknowledgment contained in the policy of the receipt of the premium by the insurer or his agent as between him and the insured,

* See *post*, Div. (b). The risk on the ship in general commences from her beginning to load and continues unabated till she has moored twenty-four hours in safety, see 1 T. R. 250; on goods, from the loading till they are safely landed, which includes the carriage to the shore in the boats belonging to the ship, but not in those belonging to the owner of the goods; see 2 Stra. 1226.

† The various perils against which the insured means to be protected must be distinctly enumerated in the policy. This part of the policy is so full, that scarcely any loss that is lawful to insure against can be considered as omitted. In our common policies they are set forth in the following words: "touching the adventures and perils which we, the insurers, are content to bear, and do take upon us in this voyage, they are of the seas, men of war, enemies, pirates, rovers, thieves, jettisons, letters of marque, reprisals, taking at sea, arrests restraints, and detentions of all kings, princes and people, of what nation, condition, or quality whatsoever, barratry of the master and mariners, fire and all other perils losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes and ship, or any part thereof." Under the words, "and of all other perils, losses, and misfortunes, that have or shall come to the hurt," every species of risk to which ship and goods are exposed from the perils of the sea voyages is embraced. This general contract is, however, qualified, as we shall hereafter see, by the usual printed memorandum, which will presently be considered in the natural order of the instrument. In most policies are inserted the words, "lost or not lost," by which the insurer not only takes upon himself the risk of future loss, but also the loss on any that may already have happened.

- [125] writer; and Lord Kenyon held that the former, before paying the premiums to the latter, might maintain an action against the assured to recover the amount of them as for money paid.

2. JOY v. BELL. E. T. 1811. C. P. 3 Taunt. 493.

Except in
the case of
fraud.

The plaintiff, who resided at Pillaw, procured A. Gordon, who was a young man just embarked in business, to effect the several policies in question, upon an assurance that he should address the ships to him, and permit him to receive the freight, and reimburse himself thereout for the amount of the premiums. Upon a communication of the proposal to the underwriters, they gave Gordon credit for the premiums: the plaintiff also remitted to Gordon, whom he had drawn into other transactions with him, bills on Thornton and Bayley, which the latter refused to accept, alleging that they waited for some explanation from the plaintiff, but that all would be right, and, in the meantime, offered to accommodate the plaintiff by accepting his own bills for the like amount, upon the security of these policies, which Gordon accordingly deposited in their hands. The plaintiff, instead of consigning his ships to Gordon, as he had promised, consigned them to Thornton and Bayley, and assigned the freight to them, so that Gordon was left destitute, as well of the means of receiving the loss on the *Vigilant*, and returns of premium, as of the expected funds to arise from the freight for the payment of the premiums to the underwriters. The defendant, therefore, claimed now to set off the premiums, which he had never received, against the loss and returns to which he was liable. The jury thinking that when the underwriter signs a policy, and thereby acknowledges the receipt of the premium, the account is finally closed between the assured and underwriter, found a verdict for the plaintiff. The Court were all of opinion that there ought to be a new trial. The jury were strongly impressed in this case, as they were in the case of *Mavor v. Simeon*, with the general doctrine that the transaction is closed when the underwriter writes his receipt, and that he cannot afterwards say the premium has not been paid; but the plaintiff knew, as appeared by his own letters, that Gordon was perfectly unable to pay these premiums. The plaintiff had prevailed on him to effectuate these policies, in effecting which he knew that Gordon, according to the common course of business, got a receipt for his immense sum, and he knew that the defendant must give these receipts. The plaintiff knew that Gordon had no fund out of which that money could have been paid; he knew that, according to the course of business, though receipts were to be given by the underwriters who subscribed the policies, yet in fact no money had ever passed between the underwriter and broker; he knew he had promised the broker to put into his hands the proceeds of the cargo of the *Vigilant*, and that he should also receive the freights of the other three ships; and then with regard to the freights, he has given the freights of these three ships to Thornton and Bayley; they became the assignees of the ships, and received the freights, and therefore the plaintiff knew that the broker never paid the premium. Knowing then that Gordon received the receipts, and that he never would pay the premium, he brings actions in this court to recover back premiums which he knew never were paid nor could be paid, so that this is a monstrous proposition on the part of the plaintiff, who says by this action against the underwriters, "Return me that premium which you never received, but which you ought to have received, and which you would have received if I had not cheated the broker, by promising him this fund, out of which he was to pay the premium, and then directing it into another channel." It is impossible that it can be supported, and therefore there must be a new trial.

See 3 Taunt. 497; 6 id. 246.

9th. *Description of sum insured.*

DOWELL v. MOON. M. T. 1815. N. P. 4 Campb. 166.

Altho' the
85 Geo. 3.
c. 63. s. 5.
requires the
specifica

This was an action on a policy of insurance, on the rules of the British Association. The policy contained the usual liberty to sue, labour, and travel, concluding with the words "to the charges whereof, we, the assured, will contribute each one according to the rate and quantity of his sum herein as

stated." There was a receipt for the premium in the common form, at and af- tions of the
 ter the rate of eighteen guineas per cent. per annum; at the bottom there was sums insur-
 a warranty against averages under particular circumstances, and against the ed, yet a
 ships trading to or from certain enumerated places, together with a memoran- mutual insu-
 dum stating that in case the ship should be lost or sold the assured was to con- rance by
 tribute and pay his proportional share of such losses, averages, &c. as should bers of a so-
 happen to the ships underwritten by the secretary for his account, three days ciety of
 after the day on which the said ship might be lost or sold, and no longer. shipowners

Gibbs, C. J. I shall hold this policy to be valid. The members of the at a certain
 Association cautiously guard against any joint liability. According to the sum, is va-
 terms of their agreement, if, when a loss happens, any of the members are in- lid without
 solvent, the owner of the ship which is lost has no claim for their share of the the sum for
 contributions upon the other parties to the policy. Thus for each portion of which the
 the sum insured there is only the separate responsibility of a single under- several
 writer, in the same manner as if the policy were subscribed at Lloyd's Coffee- members
 house by a number of unconnected individuals. may have
 insured be-
 ing speci-
 ed on the
 face of the
 policy.

10th. *Description of date.**

AFRICAN COMPANY v. BULL. M. T. 1670. K. B. 1 Show. 133.

An action on the case was brought by the plaintiff upon a policy of assur-
 ance. The defendant pleads a custom of merchants, that if any writing or
 policy of assurance be made and subscribed upon any kind of goods on board The date of
 any ship, such goods are to be deemed upon account; and if such a number the subscrip-
 of assurers should subscribe such writing to pay divers sums of money as tion to the
 should amount to the value of the goods mentioned to be assured, then all policy is
 other insurers that should subscribe after such number, by which the money material.
 so subscribed amounted to the value of the goods, were used to be discharged [127]
 from payment of the sums subscribed, though such goods were wholly lost,
 and were to return their premium; that the policy in the declaration was upon
 account; that the goods the plaintiffs had on board were worth but 2240*l.*;
 that twenty-three men had subscribed 100*l.* each, and that the defendant was
 the next subscriber; that by reason of those subscriptions before his he was
 discharged from his promise, and bound to pay back his premium, and did af-
 ter the same, &c. The plaintiff replies, that if any such a number subscribe
 to the value, and none prove insolvent, then to be discharged. *Absque Hoc.*
 That there is any such custom as the defendants hath alleged, and thereupon
 issue was joined; and at the trial it was proved very plainly and fully by sev-
 eral witnesses; and that there was never an instance to the contrary, but one
 payment on purpose since the action commenced; that where the policy is
 upon the account, and not upon goods valued, certain or value blank, the last
 subscribers are not bound as in the latter cases they are. And we had a ver-
 dict for the defendant. It was moved in arrest of judgment, that this was an
 impertinent plea; and the custom unreasonable that they should be discharged
 till satisfaction of the whole loss, when some prove insolvent.

Per Cur. The plea is ill, if upon a demurrer; but good after issue joined,
 and you put them upon it, and the custom is reasonable.

11th. *Name of underwriters or agents.†*

12th. *Memorandum at the end of the policy.‡*

* The 35 Geo. 3. c. 63. s. 5. directs that the commissioners or their officer shall write
 or mark on every policy the day, month, and year, when any printed vellum, parchment,
 or paper, stamped with the policy stamp shall be delivered by them to be used. The
 policy must be issued within three days after the insurance is made, under a penalty for
 not issuing it; and, therefore, although it is usual before the policy is formally filled up to
 make a minute of the insurance, with the initials of the persons who agree to insure, the
 memorandum is not in general of any efficacy; 3 East, 572.

† If a person employed as an agent to subscribe a policy signs it in his own name, with-
 out mentioning his principal, he will be personally responsible; see 5 M. & S. 345; 2
 Stra. 955. The policy may be signed by the underwriter personally or by his agent; but
 in the latter case the name of the principal should be introduced. A verbal authority
 suffices to sanction the signing by an agent, unless the policy is under seal; he must then be
 authorized by deed; 7 T. R. 209. As to proving the agent's authority to subscribe the
 policy, see post. Relative to remedy for breach of the policy.

‡ The memorandum at the end of the policy is usually introduced to prevent litigation

[128] (E) RELATIVE TO THE LEGALITY OR ILLEGALITY OF THE TRADE OR VOYAGE.
(a) *Trading with enemies.*

1. POTTIS v. BELL. E. T. 1800. K. B. 8 T. R. 548; S. C. 1 & B. 345.

Merchan-
dize purcha-
sed in a
hostile state
to be im-
ported into
this coun-
try, cannot
be made a
valid sub-
ject of insur-
ance.

Upon a writ of error it appeared that at the trial the plaintiffs below proved in evidence the policy of insurance in the declaration mentioned, subscribed by Potts, and dated the 7th of December, 1797; and that the policy was effected in London by Barrett and Company, insurance brokers there, by the orders and for the benefit and risk of the plaintiffs, then and still being British merchants resident in London and interested in the goods insured to the value mentioned. That the ship *Elizabeth* was a neutral ship belonging to H. Bannerman and Son, of Greetsil and Embden, in Prussia, bound on the voyage, insured from Rotterdam to Hull; and that the clearance of the ship was ostensibly from Rotterdam to Norden, because the persons then exercising the powers of government in the United Provinces would not permit the ship to be cleared out from Rotterdam to Hull, or any other port of Great Britain; and that the goods insured, consisting of sixty casks of madders, were laden on board the *Elizabeth* at Rotterdam, to be conveyed from thence to Hull by one Robert Twiss, then being the agent of the plaintiffs below, and residing at Rotterdam, by their orders and for their use, and were consigned by him to Messrs. Hewson and Gunnes, at Hull, who then were the agents of the plaintiffs below, by their order and for their sole accounts and risk. That the ship *Elizabeth*, having the goods insured, afterwards, on the 18th of December, 1797, sailed from Rotterdam for Hull, and was captured on her voyage the next day by a French ship, an enemy to the King; whereupon the counsel for the plaintiff in error on his part proved in evidence that the said sixty casks of madders, before the lading of them on board the *Elizabeth*, and before the policy was subscribed were purchased by Twiss, their agent resident at Rotterdam, in order to be sent from Rotterdam to Hull, on their account and risk at London, and were afterwards laden on board the ship at Rotterdam for that purpose. The six bills of exchange were drawn by Twiss in payment for the madders at Rotterdam, but dated at Hamburg upon the defendants in error; and which bills having been indorsed by the payers thereof respectively were afterwards duly accepted and paid by the said defendants in error in London. That before and at the time of the said purchase of the said sixty casks of madders by Twiss, and of the loading of them on board the *Elizabeth*, in order to be conveyed from Rotterdam and Hull, for and on account of the defendants in error, and also before and at the time that the plaintiff in error subscribed the policy of assurance thereon, and before and at the time of the ship's departure from Rotterdam towards Hull, and of the capture of the said ship and madders as aforesaid, hostilities had commenced and still existed between Great Britain and the persons exercising the powers of government in the said United Provinces. That the plaintiff in error also proved the payment of the premium into court in this action; whereupon the counsel for the plaintiff in error insisted at the trial, that upon the matter so proved in evidence the plaintiffs below were not entitled to recover against [129] him; that the policy upon the said madders was void; for that it is not lawful for British subjects to carry on trade with any nation which at the time is in a state of open war and hostilities with Great Britain, nor to purchase any goods in such nation, and import them from thence to Great Britain. The bill of exceptions then stated the judge's direction to the jury to find a verdict

about small losses. Next follows the usual memorandum, which is introduced to prevent litigation about trivial losses, and losses arising from the perishable quality of some description of goods. The memorandum is usually to the following effect: "N. B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under 5l. cent per and all other goods, also the ship and freight, are warranted free of average, under 5l.; per cent., unless general or the ship be stranded." The words in italics have been omitted for several years in the form of policies adopted by the two insurance companies, viz. London Assurance and the Royal Exchange Assurance; see, *post*, Div. (b) Construc-
tions.

for the plaintiffs below, the finding of such verdict accordingly, and the assignment of errors thereon in the usual form. It was contended for the plaintiff in error, that this is an illegal insurance, because it was made to protect the transportation of goods purchased in an enemy's country into this; and by the common law, -all trading with an enemy is illegal. It appears on the record that there was open war between this country and Holland; that during that time Bell's agent, resident in the enemy's country, purchased the goods in question for him there, which is direct trading with an enemy; and that Bell afterwards made the contract with plaintiffs, on which this action was brought in order to secure to himself the benefit of such illegal trading. But if the original act were unlawful, no subsequent contract for giving it effect can be supported in law.

The Court said they had very fully considered the question, immediately after the very learned argument which had been made by the King's advocate in the last term. That the reasons which he had urged and the authorities he had cited were so many, so uniform, and so conclusive to show that a British subject's trading with an enemy was illegal, that the question might be considered as finally at rest. That those authorities, it was true, were mostly drawn from the decisions of the Admiralty, and that after all the diligence which had been used, there was only one direct authority on the subject to be found in the common law books, and that one was to the same effect; but that the circumstance of their being that single case only was strong to show that the point had not been since disputed; and that it might now be taken for granted, that it was a principle of the common law, that trading with an enemy without the King's licence was illegal in British subjects. That it was, therefore, needless in this case to delay giving judgment for the sake of pronouncing the opinion of the Court in more formal terms, more especially as they could do little more than recapitulate the judgment with the long train of authorities already to be found in the clearest terms in the printed report of the case of the sloop, published by Dr. Robertson. That the consequence was, that the judgment of the Court of Common Pleas must be reversed.

2. WILSON v. MARYATT. M. T. 1798. K. B. 8 T. 31.

Action on a policy of insurance. By an article of treaty, which was confirmed by the statute 37 Geo. 3. c. 97. s. 22. the United States of America are permitted to trade to and from the British territories in India. It was contended, notwithstanding the treaty and statute, that the insurance in question was upon an illegal voyage, being "at and from Bourdeaux to Madeira and the East Indies, and back to America," whereas the treaty meant to tolerate no other trading than a direct one between America and the East Indies; and also it was insisted, that Butler and Callet, the persons for whose benefit this insurance was effected, were not entitled to the benefit of the treaty, they being natural born subjects of this country, but one of whom after the ratification of American independence had gone with his wife and family to reside in America, has ever since been domiciled there, and received as a citizen of the States of America; and the other of whom was resident and domiciled in America before the independence of that country, and has continued to be resident and domiciled there; and because their agent, the plaintiff, when he shipped the goods, and when he caused the policies to be effected, was resident in and a subject of Great Britain, and knew that the ship was destined for the British territories in India. The special verdict in this case was three times argued in the King's Bench, and once in the Exchequer Chamber, and the learned judges composing both those courts were unanimously of opinion that a natural born subject of this country, though he cannot throw off his allegiance to the country, yet may be a citizen of America, for the purposes of commerce, and entitled in the latter character to all the benefits of the treaty; and the trade allowed by the treaty between America and the East Indies need not be direct; it may be carried on circuitously through any country in Europe, including Great Britain. The plaintiffs had judgment. In the Court of King's Bench Lord Kenyon added, that if in the commencement of one

And even an enemy's port, or calling for or ders, may vitiate the policy; but a natural born subject, domiciled in a neutral state is not prevented from effecting a legal insurance on property to be conveyed from such neutral state to a place at war with this country.

entire voyage there be any thing illegal, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, such illegal commencement would have made the whole illegal, and the assured could not recover upon the policy. See 1 B. & P. 430; Sid. 113, 114; 1 Hogg, 100; 8 T. R. 546.

To render the trading illegal, some act of hostility must have been done by this country; the other state merely excluding British vessels is not sufficient;

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3. MULLER v. THOMPSON. H. T. 1811. N. P. 2 Campb. 610.

Action on a policy of insurance. The ship was Danish, and brought a cargo of wines from Bourdeaux. These she unloaded and reloaded at Chatham; the captain likewise put on board there eight cases of British manufactured goods, which together with his British papers, he stowed away in the bottom of the hold. The ship then proceeded on her ulterior voyage; and after touching at Gottenburg, she was captured by a French privateer, and carried into Dantzic. At first there appeared no evidence against her, and she would have escaped had not the British goods and papers been afterwards discovered; but by means of them she was condemned, with her whole cargo. The underwriters first objected that the voyage was illegal, as our ships were excluded from Konigsberg, which must, therefore, be considered an enemy's port. Lord Ellenborough. We are treated very discourteously there; but it is not to be considered an enemy's port. Konigsberg belongs to Prussia; we are placed in a strange anomalous situation with regard to that country and others on the continent, but it is not that of war. We have published no declaration of war against Prussia; we have not issued letters of marque and reprisals; we have not done any act of hostility. Therefore, though the relations of amity are not very strong between us, yet we are not at war with Prussia, and a voyage from England to a Prussian port is not illegal.

4. ATKINSON v. ABBOTT. E. T. 1809. K. B. 11 East, 135; S. C. 1 Campb. 535.

And the object of the adventure may render the insurance valid, altho' the vessel may have been destined to an enemy's port;*

Insurance on provisions from London to Helsingberg, the Sound, and Copenhagen, all or either, which provisions were intended for the supply of the British fleet and army, then engaged in the expedition against Copenhagen, of which they were then in possession, but were about to evacuate it, and were consigned to merchants there and at Elsinore. If it had been made out in evidence that this was a voyage intended to supply the enemy with provisions, that would at once have avoided the policy; but the defendant failed in his attempt to do that, and the jury were satisfied that that was not the object of the adventure. The obvious intention of it, and so it was understood by the jury, was to supply our own fleet and army off Copenhagen; and if, on his approach to that place, the captain had not found that fleet there, he would probably have gone to Helsingberg.

Lord Ellenborough, C. J. determined, however, that the mere circumstance of taking a clearance to a place where a ship does not intend to go, does not make the voyage illegal so as to vacate the policy; and said, but I am not satisfied that the captain had determined not to go to Helsingberg in any event.

5. GEST v. MASON. H. T. 1786. K. B. 1 T. R. 88.

And the Courts will not grant a new trial simply to admit evidence of the illegal design.

The defendants were West India merchants, and had property in the islands captured by the French in the last war; that it was a common practice to supply these islands with provisions from Ireland, notwithstanding they were in the hands of an enemy; that the defendants, who acted as their own brokers, had for this purpose employed neutral vessels, and had caused them to be underwritten by the plaintiff, from different ports on the continent to Ireland, thence to Madeira, and St. Thomas, and to all of them was annexed the liberty of going to any one of the captured islands. It had been long doubted whether these policies were legal; but in the case of the *Bella Juditha*, where on a similar policy was effected, the Court were of opinion that the assured could not recover. The plaintiff, in consequence of the above decision, had

* And it must appear that a trading with the enemy was in the contemplation of the insured; merely trading between places where there are hostile parties will not invalidate the policy.

refused to pay where there had been a loss. The defendant's counsel at the trial contended, that as these voyages were illegal, as both the parties were *in pari delicto*, the maxim of law *melior est conditio possidentis*, ought to prevail; but Lord Mansfield, being of opinion that these policies were not illegal on the face of them, directed a verdict for the plaintiff.

Per Cur. The defendant makes this application to the Court in order to supply his own negligence, when it is evident he was not taken by surprise at the trial. If it do not appear on the face of the policy that it is void, it ought to have been shown by evidence; but no such evidence was offered.—Rule refused. See 1 Wils. 98; Salk. 653. [132]

6. BLACKBURN V. THOMPSON. H. T. 1812. K. B. 3 Campb. 61; S. C. 15 East, 81. S. P. JOHNSON V. GREAVES. 2 Taunt 344.

The King having by orders in council, declared certain ports in St. Domingo not hostile, which had formerly been, but were no longer in the possession nor under the dominion of France, though such declarations were made for collateral and limited purposes, not covering in their terms the trading in question, a trading to such ports from parts of the King's dominions not being named in such limited orders. When a colony which has been in the possession of enemies, is incidentally recognised by a British act of state as no longer under their dominion, a subject of this country may lawfully trade to a colony so recognised.

Per Cur. It must be held to be legalized, the same as to neutral ports in general, by such authoritative recognition of those ports, St. Domingo not being hostile; and the inference as to the legality of such neutral trade is not rebutted by a subsequent order of council, opening the trade generally (so as to cover in its terms the particular adventure) to all ports of St. Domingo not in the possession of France. And such trade to neutral ports, requiring no licence from the crown, is not restricted by the fact of a British ship carrying a licence for trading to them from Great Britain with a certain specified cargo; but the British trader may notwithstanding carry other lawful goods, and insure his whole adventure, and may recover from the underwriter a loss arising from capture by a British cruiser, though induced by the fact of such trading with goods not covered by the licence, which was produced to the captor; for the license itself not being necessary, the carrying of goods not included in it was no legal cause of seizure, however it might operate upon the question of costs in the prize court.

(b) *Trading with neutrals.*

1. BARKER V. BLAKES. H. T. 1808. K. B. 9 East, 283.

Per Cur. It is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country, the voyage and commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country, though the neutral thereby subjects his ship to be detained and carried into a British port for the purpose of search; and, therefore, a British underwriter, after condemnation of the enemy's goods found on board, and liberation of the ship and the rest of the cargo is liable to the neutral owner of goods insured in the same ship whose voyage was so interrupted, either as for a total loss, if notice of abandonment upon the loss of the voyage be given in reasonable time, or for average loss, if such notice be given out of time. A neutral vessel may be employed in carrying enemy's property from the states of the neutral to the enemy's country, and a policy effected thereon is valid. So is one on a voyage to a neutral or friendly port, although the neutral owner is himself resident in a

2. BROMLEY V. HESELTINE. M. T. 1807 K. B. 1 Campb. 75.

Assumpsit on a policy of insurance. The defence first attempted was, that the goods were destined not for Messina but Leghorn; and that, as Leghorn had been some time before permanently occupied by the French troops, an insurance on such a voyage by an English subject was illegal and void. The only evidence in support of this was an expression in the bill of lading, which stated that the goods were to be delivered to Joseph Chesmin and Peter Della Ganga and Co. in Leghorn; but the captain of the ship swore positively that, though the consignees resided in Leghorn, he was proceeding when he was captured to Messina, in Sicily, there to deliver the whole of his cargo. The by a neutral on a voyage to a neutral or friendly port, although the neutral owner is himself resident in a

* But if a neutral violates his neutrality by affording direct assistance to the enemy, as conveying arms, ammunition, and warlike stores, the traffic is illegal, and the policy consequently void; see Vattel. b. 3. c. 7. s. 106; 1 Roll. Ab. 27; 3 id. 108; 4 id. 94. 354.

place occupied by the enemy.

Lord Ellenborough. I do not know that, merely because an alien happens to be resident in an enemy's country, goods to be delivered for him at a neutral or friendly port are on that account uninsurable. Suppose a British merchant to be entrapped and confined in an enemy's country, it can scarcely be said that all the trade he may still carry on is in aid of the King's enemies, illegal, and incapable of being insured.

(c) *Trading to the East Indies, and South Seas.**

The trade or voyage insured leading to an infringement of the exclusive privileges granted to the East India Company invalidates the policy.

CAMDEN V. ANDERSON, E. T. 1798. House of Lords. 1 B. & P. 272; S. C. 8 T. R. 43.

The Court held that the exclusive right of trading to the East Indies, granted to the East India Company by Stat. 9 & 10 W. 3. has never been put an end to, and any infringement of it is a public wrong; though such parts of that act as inflicted penalties, &c. were repealed by 55 Geo. 3. c. 52; and though the latter act says, that no acts or parts of acts thereby repealed shall be pleaded or set up in bar of any action, &c., it is competent to underwriters who have subscribed policies on ships trading to the East Indies, in contravention of the 9 & 10 W. 3. to avail themselves of the illegality of such trading in an action brought on the policies.

(d) *Trading contrary to the revenue law.*

[134] 1. PLANTHE V. FLETCHER. M. T. 1779. K. B. Doug. 251. BOUCHER V. LAWSON. Ca. Temp. Hard. 89. TARLETON V. M'GOWLEY. Peake, 205. JOHNSON V. MACHIELSNE. T. T. 1811. N. P. 3 Campb. 45. JAMES V. CATH-ERWOOD. T. T. 1823. K. B. 3 D. & R. 190.

An insurance in contravention of our revenue laws is invalid, but not if it merely conduces to an infringement of the revenue regulations of a foreign state.

The plaintiffs, Planche and Jacquery, merchants in London, insured goods "on board the Swedish ship called the Maria Magdalena, lost or not lost, at and from London and Ramsgate to Nantz, with liberty to call at Ostend, being a general ship in the port of London for Nantz." There was a declaration in the policy that the insurance was made on account of "certain persons carrying on trade under the name and firm of Vallee and Du Plessis, Monsieur Lusseau, le Jeune, Guillaume Albert, et Poitier de la Gucule." The defendant underwrote the policy for 300*l.* at three guineas per cent. The ship's clearances from the Custom-house in London, and her other papers, were all made out as for Ostend only; but the ship and goods were intended to go directly from London to Nantz, without going to Ostend. Bills of lading in the French language, dated the 18th of July, 1778, were signed by the captain in London, but purporting to be made at Ostend, and that the goods were shipped there to be delivered at Nantz. The policy was subscribed by the defendant on the 7th of July, and the lading was taken in between the 24th of July and the 17th of August. The proclamation for making reprisals on French ships, &c. bore date the 29th, and appeared in the Gazette on the 31st of July. Two underwriters had signed the policy, after the proclamation, at the same premium of three guineas, on the 31st of July, and the other on the 7th of August. The ship sailed on the 24th of August, and was taken by a King's cutter on her way to Nantz. After her departure from Gravesend the captain threw overboard all the papers he had received from the Custom-house at London: they had been obliterated by the Custom-house officers at Gravesend and were no longer of any use. The ship was released by the Admiralty, but the goods were condemned. The plaintiffs had no connection or share in the ship. The grounds of the application for a new trial were two:—1. That there was a fraud on the underwriters, the ship having been cleared out for Ostend, and yet never having been designed for that place. 2. That, as hostilities were declared after the policy was signed, and before the ship sailed, the defendant ought to have had notice, that he might have exercised his discretion whether he would choose for a peace premium to run the risk of capture.

The exclusive privileges which formerly belonged to the South Sea Company having been abolished by the stat. 55 Geo. 3. c. 57. it will suffice to refer to the cases decided upon; *Dunlop v. Gill*, Taunt. 193; S. C. 2 Marsh. 460; 1 B. & A. 354. But, now by the 4 Geo. 4. c. 80. British vessels are allowed to carry on a free trade with the East Indies, except as far as regards the trade with China, and the trade in tea, which still belongs exclusively to that company.

Lord Mansfield. This verdict is impeached upon two grounds:—1st. It is said, there was a fraud on the underwriters in clearing out the ship for Ostend, when she was never intended to go thither. But I think there was no fraud on them—perhaps not on any body. What had been practised in this case was proved to be the constant course of the trade, and notoriously so to every body. The reason for clearing for Ostend, and signing bills of lading as from thence, did not fully appear; but it was guessed at. The *fermiers genereaux* have the management of the taxes in France. As we have laid a large duty on French goods, the French may have done the same on ours; and it may be the interest of the farmers to connive at the importation of English commodities, and take Ostend duties, rather than stop the trade by exacting a tax which amounts to a prohibition; but, at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another. With regard to the evasion of the lighthouse duties, the ship was not liable to confiscation on that account. The second objection is, that the policy was made before, and the ship sailed after, the proclamation for reprisals. But every man in England and France, on the 17th of July, expected the immediate commencement of a war: I will not say it was actually commenced, but the ambassadors of both countries were recalled; the *Pallas* and *Licorne* were taken, the fleets at sea, and, as it appeared afterwards, waiting for each other to fight. It does not appear that the goods were French property. An Englishman might be sending his goods to France in a neutral ship, but it is indifferent whether they were English or French; the risk insured extends to all captures; and as other underwriters signed at the same premium, after the proclamation, it appears that the war risk was in view when the defendant signed. Shall he avail himself of an event which increases the risk, but which he had in contemplation when he underwrote the policy? I am of opinion that there should not be a trial.

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2. *LEVER v. FLETCHER*. H. T. 1780. 1 Park on Ins. §13.

This was an action on a policy of insurance at and from London to Pensacola and Manshae, in the river Mississippi, with liberty to touch at Portsmouth, and Jamaica. The ship insured was employed in the usual trade in the river Mississippi, and traded at and from Little Manshae, on the island of New Orleans, part of the dominions of Spain. The place mentioned in the policy is part of the continent of North America, on that side of the river which France and Spain, by the treaty of Paris, in 1763, surrendered to Great Britain, and is about thirty-seven leagues higher up the river than New Orleans. The loss happened by a seizure of the ship at Little Manshae, by the Spanish governor, as a reprisal for transgressions alleged to have been committed by a King's ship in the Lakes. The counsel for the defendant contended that the policy in question was on a trading voyage, and that the trade itself was an illicit one. Lord Mansfield. The first question is, whether this policy covers the trading on the Mississippi, before the ship's arrival at Manshae? The trading at Little Manshae is a delay of the voyage, and an increase of the risk. If the policy do not cover this part of the trading then it is a deviation, and there is an end of the contract, at least so as to prevent the plaintiff from recovering. It is very clear what the trade is; every trading with the subjects of Spain is illicit. By the treaty of Paris the navigation is free to both countries, and the municipal laws of both countries remain. Though such trading be contrary to the laws of Spain, yet no country pays attention to the revenue laws of another, therefore, if the defendant had, with full knowledge that it was a smuggling trade with Spain, made the insurance, then it might be a fair contract between the parties. But the main question for consideration seems to be, whether this trading at Little Manshae was insured by the policy? The jury found for the defendant, and it may be presumed on the ground of deviation.

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(e) *Trading contrary to royal proclamations.*

1. *DELMADA v. MORTEUX* M. T. 1680; Park, 311.

This was an action on a policy of insurance on the *Bella Juditta*, a Venetian ship.

Trading in
contraven-
tion of an
embargo;

tian ship, at and from London to Grenada, with liberty to touch at Cork and Maderia, to load. The defendant pleaded the general issue; and the cause came to trial before Mr. Justice Buller, when the jury found a special verdict, the material facts in which were these; that the ship was a Venetian vessel, and the plaintiff a subject of the state of Venice; that in October, 1782, the ship sailed on her voyage from London to Cork, and then took in a loading of provisions, the property of French subjects, the enemies to the King of Great Britain. That the said ship having taken in at Cork clearances and bills of lading for Madeira, an island belonging to the King of Portugal, sailed in December, 1782, from Cork to that island, at which she was neither to unload any part of her cargo nor to receive any goods on board, but where she took clearances and bills of lading for the island of St. Thomas, belonging to Denmark, whither she was not destined; that on her voyage from Madeira to Grenada, within fourteen leagues of the latter, she was captured by an English man of war as prize, and carried to St. Lucia; that when the ship sailed from London, and from thence till after the capture, Grenada was in the possession of the French King. The special verdict further finds, that his Majesty, on the 18th day of August, 1780, laid an embargo upon all ships and vessels laden or to be laden in the ports of the kingdom of Ireland with black cattle and hogs, beef, pork, butter and cheese, or any sort of provisions.

Lord Mansfield. In this voyage there is not a breach of the embargo; the King in time of war has an undoubted right to lay an embargo; in time of peace it is another question. Every power lays them on. If the ship had only been carrying goods of an enemy on a voyage lawful for her to perform, she might have been entitled to freight. But here the sentence says she shall not. And why? Because she has done a wrong thing. It is a fraud; for under colour of neutral port, she goes to an enemy's port; she breaks an embargo. What the consequence of that is has not as yet been settled; but to break an embargo is undoubtedly a criminal act; and wherever a man makes an illegal contract, this Court will not lend him their aid. The defendant accordingly had judgment.

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2. *BIRD V. APPLETON*. E. T. 1800. K. B. 8. T. R. 562. 570. S. P. *LEVER V. FLETCHER*. 1718. Cited Park, 313.

Or of the
terms of a
treaty;"

This was an insurance on the *Confederacy*, an American ship, at and from Canton, in China, to *Hamburgh* or *Copenhagen*; and at the trial a special verdict was found, the facts of which, as far as this point requires the statement of them, were—"that the ship *Confederacy* was an American built ship, the property of American subjects; that the ship sailed from Canton towards *Hamburgh*, with the goods on board, in January, 1797, having on board a passport duly made out and granted, according to the form annexed to the treaty of commerce between France and America; and during her voyage was captured by a French ship of war, and carried into *Nantz*, where proceedings being instituted before the tribunal for determining questions of prize, the ship and cargo were condemned as prize." The sentence began with the following considerations: "Considering that although it appears by reading and examining the documents, and by the declaration of the captain, supercargo, and the greatest part of the crew, that the ship *Confederacy* has not ceased to be neutral property, and belonging to neutral citizens and subjects of the United States of America; considering, that although by the same documents and declarations it is equally evident and proved that the goods shipped were laden by neutral citizens for account of neutral citizens; considering that, notwithstanding these favorable presumptions, nothing can exonerate the captain and supercargo from having regular dispatches, in order to prove the neutrality of the ship." The sentence proceeded to recite certain French ordinances, which declare to be good prize all neutral vessels, not having on board a list of the crew, attested by the public officers of the neutral places. It then says, "considering that so far from derogating from

* As in a violation of a blockade; *Vattel*, 332. b. 2; *Grotius* 1518; 3 *Roll. Ab.* 324; 1 *Roll. Ab.* 86; id. 150.

the general regulations for all nations in favour of the Anglo-Americans by the treaty of February, 1778, it implicitly subjects them to it by the 26th and 27th articles, which oblige them to conform to the model of the passport annexed to the treaty." It also states a law of the convention, and another of the executive directory of the 12th Ventose of the fifth year, which latter recites the ordinances of 1744 and 1778, and declares that all American vessels shall in consequence be good prize, which shall not have on board a list of the crew in due form, such as is prescribed by the model annexed to the treaty between France and America at 1778. The sentence then concludes thus: "The tribunal, in conformity to the above mentioned law and regulations, and particularly the decree of the executive directory of the 12th Ventose, fifth year, adjudges and declares the validity of the prize of the foreign ship the Confederacy, and all the goods and effects composing the lading or cargo of the ship, in default of the captain and supercargo being regular in their list of crew and despatches." The special verdict also found that ships belonging to America never did at any time prior to the capture in question carry with them lists of their crew, attested in the manner required by the ordinances referred to; and that America has always insisted, and still insists, that her ships are not, by treaty or otherwise, bound or obliged so to do.

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Lord Kenyon said: "After the greatest attention I have been able to bestow on the subject, I adhere to the opinion that we gave in the case of *Pollard v. Bell*, and that decision is directly in point to the present case." His Lordship then adverted to particular parts of the sentence, which it is unnecessary here to consider; but concluded that it was manifest from an attentive consideration of the whole sentence, that the single ground on which it proceeded was that mentioned in the concluding part of the sentence, namely, "in default of the captain and supercargo being regular in their list of crew and their despatches." Now that is neither required by the law of nations or by the treaty between France and the United States of America; and it is found by the verdict that all the requisites of that treaty were complied with. The other judges concurred.

3. *GIBSON v. SERVICE*. E. T. 1814. C. P. 5 Taunt. 433; S. C. 1 Marsh. 119; S. P. *GIBSON v. MAIS*. H. T. 1814. C. P. 1 Marsh. 46.

The ship sailed from Liverpool on the 2nd of June, arrived in August in the River Congo, and during her stay there on the 9th of August was taken by the Prince of Orange, British privateer, and by her carried to Surinam, where she was condemned. The loss was averred to have been, 1st. By unlawful seizure. 2dly. By barratry. It appeared in evidence, that the ship Croydon had carried out gunpowder and muskets in concert with, and to be delivered, to the supercargo of the Washington. It was, for the defendant, contended that the Washington being thus connected with the Croydon in this transaction, the plaintiffs could not recover without showing it to have been legal. The Chief Justice was of opinion that the plaintiffs could not support this action. He said that the legislature meant to exclude any one from exporting arms without their licence; that permission had been given to all vessels going to the coast of Africa to export arms for the purpose of trading on that coast, but that it was unlawful to export arms for any other purpose; and in order that the commissioners might be certain that this was the purpose for which they were exported, bonds were required, which would never be given up without a certificate of their having been so employed. In this case the goods had been carried out under pretence of trading with them on the coast of Africa, when, in fact, they were taken for the purpose of delivering them to the Washington. The consequence of this, if legalized, would be, that the owners of the Washington, or any other ship, might export any quantity of arms to America, without being answerable to government, or to those who might have given security for them at the Custom-house. It was clear, he said, that such was the intention of these parties; this, therefore, was not the exportation for which the bonds were given. The proprietors of the arms and powder could not have maintained an action against the owner of the Wash-

Or of an order in court, is idle, gal, and an insurance sounded up on it void;

ington for the value of them, because he was practising a fraud on this country, and if the owners of the *Washington* were aware of the illegality of this transaction, and were conniving at it, it followed that the insurance must be illegal. She might have intended to have disposed of the goods *bona fide* on the coast of Africa, but it was enough for the support of his lordship's opinion that she had had it in her power to do otherwise. A nonsuit was entered, with liberty to the plaintiff to move to set it aside.—Rule refused.

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Even altho' part of the adventure may be clearly legal and the other part capable, at the expiration of a limited time of being made so.

4. *HOLLAND V. HALL.* M. T. 1817. K. B. 1 B. & A. 53.

It was agreed between two parties that they should be jointly interested in certain proportions in a voyage to be undertaken by a particular vessel from Liverpool to Holland, with a cargo of rock salt, and also in a further voyage to South America, with a view of sending out military stores to that quarter, the exportation of military stores having been prohibited by an order in council. The agreement was considered as contemplating one entire and continued adventure, which was *prima facie* illegal; and although the stipulation might have been legalised by the expiration of the time specified in the order in council, by a licence being procured for the exportation of the stores, or by the abandonment of the illegal part of the voyage, yet as the adventure was apparently illegal, the Court held it incumbent on the party who sought to establish a claim under it to show that a licence was intended to be obtained, or that under the circumstances the contract was not with an illegal design.

(g) *Trading contrary to navigation laws.**

1. *MORCK V. ABEL.* H. T. 1802. C. P. 3 B. & P. 35. *LUBBOCK V. POTTS.* T. T. 1806. K. B. 7 East, 449. *CHALMERS V. BELL.* H. T. 1804. C. P. 3 B. & P. 604. *HENTIG V. STAMFORTH.* 5 M. & S. 122; S. C. 4 Campb. 270. 1 Stark. 254. *REDHEAD V. CATES.* E. T. 1815. N. P. 4 Campb. 188; S. C. 1 Stark. 14. *GRAY V. LLOYD.* M. T. 1811. C. P. 4 Taunt. 136. *HAINES V. BUSH.* 5 Taunt. 522. *SEWELL V. EXCHANGE ASSURANCE COMPANY.* 4 Taunt. 856. *COHEN V. HANNISON.* 5 Taunt. 105. *GALE V. DUNLOP.* E. T. 1815. C. P. 7 Taunt. 204. *OLIVERSON V. LOUGHMAN.* M. T. 1815. K. B. 4 M. & S. 346. *RURECHON V. HUMBLE.* 1 Dow. Rep. 191. *HOLLAND V. HALL.* H. T. 1802. C. P. 1 B. & A. 58.

A policy of there are Danish settlements, to Copenhagen, and the ship loaded at Calcutta, contrary to 12 Car. 2 c. 18. s. 1. An objection was taken to the plaintiff's recovery on the ground of its being illegal, under the provisions of the 12 Car. 2. c. 18. s. 1. to export goods from Calcutta in any ship not belonging to a British subject; and this objection prevailing, the plaintiffs then insisted that if the exportation from Calcutta were illegal, the risk never commenced, and that the plaintiffs therefore were entitled to a return of premium. The jury were directed by his lordship to find a verdict for the plaintiff, liberty being reserved to the defendant to move that such verdict might be set aside, and a

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nonsuit be entered.
Per Cur. Unfortunately this policy was effected previous to the passing of the 37 Geo. 3; and though we believe that before the passing of that statute the provisions of the navigation laws had been relaxed in practice with respect to foreigners, still in a court of law the plaintiffs are not entitled to recover, if the trading in question contravened the regulations of that act. The point, however, upon which this case comes before the Court is, whether there be any difference between this case and that of *Vandyck v. Hewitt*? 1 East. 96. Undoubtedly that was a case in which the trading was in direct violation of the common law of this country; but before that decision took place many of the distinctions which had been taken between immoral and illegal contracts had been considerably shaken; and the principle which we think must now be ex-

* A large variety of cases are to be found in the Reports as to what amounted to an infringement of the stat. 12 Car. 2. c. 18, and other acts, which constitute the ancient system of our navigation laws; but as that statute, and most of the others upon which the decisions have been pronounced, have been repealed, or so materially altered by 3 Geo. 4. c. 42. 44, 45. as regards their effect and language, it appears preferable to refer to the cases in the text than to give a full abridgment of them.

tracted from the cases upon this subject is, that no man can come into a British court of justice to seek the assistance of the law who founds his claim upon a contravention of the British laws. Let us consider then what this policy is. It is an insurance upon a voyage from any part of Bengal to Copenhagen. The underwriter contends that large as the policy is, still it is the business of the assured to take care that he takes in his cargo at some port in India, where he may legally do so. The assured having loaded at Calcutta has not attended to that restriction, but has thereby contravened the navigation act. Capture being one of the losses insured against, the assured has claimed an indemnity upon that ground; to which the British underwriter answers, "you had no right to take in your cargo at a British settlement," and therefore he refuses to pay. The assured sets up a distinction in his own favour upon the ground of his being a foreigner, and urges that although he may have contravened the British laws, he has done so from ignorance only. But even looking at the case in this point of view, we do not think the plaintiff is taken out of the general rule applicable to cases where a party enters into an illegal contract. The case of *Andree v. Fletcher* is a very strong authority, for there it was holden that a foreigner could not recover back the premium on a policy which was illegal according to the laws of this country. The question here is, whether the plaintiff having contravened the British laws, can recover by the aid of those laws? And after consideration of all the cases, we are of opinion that he cannot recover, and that the defendant is entitled to have a nonsuit entered.

(F) RELATIVE TO LICENCES TO TRADE WITH ENEMIES, AND, TO MAKE VOYAGES THAT WOULD OTHERWISE BE ILLEGAL.* See *post tit.* Licences to trade.

(G) RELATIVE TO THE LEGALITY OR ILLEGALITY OF THE RISKS INSURED [141]
AGAINST.

1. *GLOVIES v. COWIE*. H. T. 1814. K. B. 1 M. & S. 54.

A broker who had neglected to insure the premium according to the directions of his principal, set up as a defence that he was directed also to insure against British capture. It was objected by the defendants, that the order for the insurance was illegal, inasmuch as it contained a direction to include loss by British capture, and therefore could not be made a ground of action against the defendants for not complying with it. But Lord Ellenborough, C. J., held, that the order was obligatory upon the defendants to insure the premium; for although they might have renounced the order altogether if they had so pleased, yet, if they adopted it, they were bound to execute it; as far as by law they might, *secundum formam jubentis*. Whereupon the jury found a verdict. *Per Cur.* It is true that the plaintiffs say in their second letter, that they added British capture, though they knew it was not lawful; but it is not a crime to insure against British capture, so as to make the whole policy illegal and void, as this Court seem to have thought in the case of *Lubbock v. Potts*, 7 East, 449: though perhaps such insurance would have been void *pro tanto*. In this respect the defendants conducted themselves with adroitness, by effecting an insurance in general terms, which would be construed to extend to such captures only as they might lawfully insure against.

2. *LUBBOCK v. POTTS*. T. R. 1806. K. B. 7 East, 451; S. C. 3 Smith, 401. But it may

In an action upon a policy of insurance on ship and goods, British property, at and from Trinidad to Gibraltar, with liberty to touch, ship, and exchange property at any one of the West India islands, particularly Martinique, against all risks, British capture, seizure, and detention, including loss by perils of the seas, several questions were made; first, as to fraud, which was given up; by British next, as to the legality of the policy; and lastly, as to the legality of the voyage under the navigation acts. And a verdict was taken for the plaintiffs, re-
An insurer cannot insure against British capture is void.
But it may be made against such a risk so far as a detention of vessels would be unlawful;

* Although we have before seen that trading with an enemy is illegal, and a policy effected upon such a risk is invalid; yet the King, by licence, may authorize and sanction voyages to hostile ports, and thus legalize the speculations.

The cases connected with this branch of our subject, as they necessarily involve the general principles of the licensing system, will be collected and arranged under the title of "Licences to trade."

serving the point as to the legality of the exception from British capture; and afterwards a rule was obtained to show cause why the verdict should not be set aside and a nonsuit entered. The exception against British capture was added subsequently to the making of the policy, as follows: "I hereby agree, in consequence of the above mentioned letter (a letter wherein the correspondent was desirous of being made secure against all risk), and in consideration of five guineas per cent. additional premium, to insure against all risks whatever, British capture, seizure, and detention included." The ship went first from Gibraltar to Martinique, with fruits and wine, and thence to Trinidad, and took in sugar and coffee, plantation produce, and afterwards sailed for Gibraltar, and was lost on her voyage thither. She cleared out for Cork and London. By statute 12 Car. 11. c. 4. s. 10. no sugar, tobacco, cotton, &c., or timber of the growth, production, or manufacture of any British plantation, in Asia, Africa, or America, may be transported to any place whatsoever other than to some British plantation, or to Great Britain or to Ireland, upon penalty of forfeiting the ship and goods; and it was now contended that as this was an illegal voyage, and the ship and goods might have been forfeited, the plaintiff could not recover in this action.

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Lord Ellenborough, C. J. If the words can be understood in a limited sense which is authorized, then you might insure on it against such capture; in *Kelner v. Le Mesurier* the property became enemy's property, and it was held, that if an insurance against capture generally should be an insurance against that which, if the party had inserted it in terms, would not have been legal, then it could not be a valid policy.

3. *BARKER V. BLAKES.* H. T. 1808. K. B. 9 East, 283.

And this
may be
done even
by a neu-
tral as well
as a British
subject;

This was an action on a policy of insurance, dated the 4th of August, 1803, on a quantity of oil belonging to an American proprietor, shipped on board an American ship, the *Hannah*, on a voyage to and from New York to Havre de Grace. Lord Ellenborough, C. J. The whole amount of loss claimed on the part of the plaintiff is 45*l.* 2*s.* 8*d.*, consisting of 20*l.* 19*s.* the freight and expences paid under the sentence of the Court of Admiralty, and 24*l.* 3*s.* 8*d.* the difference, I presume, between the invoice value of the oil in America and the proceeds of the sale here. The defendant contends, that the plaintiff is at any rate not entitled to recover the latter item of loss, his claim thereto being merely founded on an abandonment, which was not made, as the defendant insists, in due time. But he further contends that the plaintiff cannot by law recover at all, even to the extent of the average loss of his freight and expences, under this policy; and that to allow of such a recovery would be to allow of an indemnity being afforded, through the medium of British insurance, to neutrals acting in contravention of the interests and policy of Great Britain, in the carrying of the goods of its enemies; that in so doing the neutral had in effect violated the duties of his neutrality, and assumed a hostile character in respect to this country; but it does not appear to us that this general objection to the plaintiff's right to recover is well founded.

4. *VISGER V. PRESCOTT.* M. T. 1795. N. P. 5 Esp. 184.

Or against
a tempora-
ry deten-
tion, with-
out any
blame be-
ing imputa-
ble to the
insured.

The *Fox*, with the goods insured on board, set sail from New York on the 1st of June, 1803, bound on a voyage to Leghorn, the captain having orders to touch at Gibraltar, for information on the subject of war between England and France; and if, on his arrival at that place, such a war existed, and he could not proceed to Leghorn, he was then to sail with the goods insured to Genoa, Naples, or Palermo; that Messrs. P. and A. Felicitig and Co. were inhabitants of Leghorn, and carried on business there as merchants; that at the time of the ship's sailing from New York, and also at the time of the capture, Leghorn was garrisoned by French troops, though when the goods were loaded on board the *Fox* at New York the shipping did not know that a war had broken out between England and France; that on the 12th of July following the *Fox* was captured by his Majesty's brig *Le Victorieuse*, and carried into Gibraltar on the 15th of the same month; that proceedings were instituted there in the Vice-Admiralty Court, the sentence of which, after re-

storing the *Fox* and all the cargo but goods in question, stated, "That, forasmuch as it appeared doubtful, under all the circumstances of the case, whether the property of the inhabitants at Leghorn was liable to be treated indiscriminately as the property of citizens of the French Republic, the judge was pleased to reserve the final adjudication of the goods in question for the space of six months, for further information respecting such doubts," and pronounced for just cause of seizure of the said brig and goods, and directed freight to be paid to the master, and also the captor's expences to be charged on the said goods so reserved; that, on the 20th of August following, a commission was issued for unloading the goods, and for the sale of them by public auction; and that, on the 14th of February, 1804, a final decree was made, which directed that the goods, or the value thereof, should be restored to the owners, P. and A. Felicitig, subjects of his Majesty the King of Etruria, and pronounced for just cause of seizure. But Lord Ellenborough, C. J., said, that when the Vice-Admiralty Court pronounced for just cause of seizure, they did not adjudge that the goods insured were goods condemnable; that the capture in this case was a capture of neutral property; and that the insurance thereon contravened no policy of the state, which constituted the principal difference between this case and that which had been cited. See 8 T. R. 31; 1 B. & P. 430; 11 East, 232; 2 id. 494; 2 Taunt. 299.

5. *SIMON V. BOYETT*. M. T. 1813. K. B. 2 M. & S. 94. 98.

Policy of insurance on ship and goods at and from London to any ports in the Baltic, with liberty to carry simulated papers and clearances, and until safely warehoused in the warehouses of the consignees at the ports of discharge, at forty guineas per cent. premium. The Court held, that the underwriter was liable for a loss arising from confiscation by the Prussian government, notwithstanding the persons in whom the interest was averred were Prussian subjects, Prussia not being at war with this country, it being found that at the time of effecting the policy all direct commerce between this country and the ports in the Baltic was prohibited by the powers possessing ports; but, notwithstanding, an extensive course of commerce was carried on between this country and those ports by means of simulated papers and clearances, which was well known to all descriptions of persons, such as plaintiffs and defendants.

(H) RELATIVE TO HOW FAR A PART OF A CARGO OR VOYAGE BEING ILLEGAL WILL VIATATE THE WHOLE INSURANCE.

1. *NELSON V. MARRYATT*. M. T. 1798. K. B. 8 T. R. 31.

The plaintiff declared on a policy of insurance, made the 29th of February, 1796, and averred to be for the use and benefit of John Collet, upon the American ship *Argonaut* and cargo, "at and from Bourdeaux to Madeira and the East Indies, and back to America, with liberty to touch, stay, and trade at all ports and places wheresoever on her outward and homeward bound voyage."

Per Cur. The objection is, that the voyage insured was a part of a voyage, the whole of which (supposing it to be one integral voyage) was not legal in its inception, and that if there be any infirmity in any part of an integral voyage for this purpose it becomes illegal. But this argument is too refined as applied to this case. Before the commencement of this voyage there was a rumour that a treaty between the two countries was in agitation, and this person came to England, probably with a view of carrying on the voyage to the East Indies under the treaty. However, in deciding this case, we must look to the facts disclosed in the special verdict. Now it is not there stated, that the continuation of the voyage to the British settlements in the East Indies was the voyage that was at all hazards to be performed when the voyage began in America; for though different plans had been suggested by Butler in his letter, for the continuation of the voyage, it is only found by the special verdict that Collet, when he sailed from America intended to go to the East Indies, without saying to that part which belongs to Great Britain. As far as respected the American, every other port was *mare liberum*; and though before the treaty the party assured could not have gone to any of our ports in the East Indies, without being guilty of an infraction of our laws, he might

The property of a foreigner may be insured against a seizure or detention by the state of which he is a member.

An insurance of the latter part of an integral voyage is void.

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have gone to any other port in the East Indies. Every thing, therefore, in the verdict relating to these different plans, though a fair subject of investigation and discussion, may now be laid out of our consideration, it not being found in any part of the special verdict what precise voyage the parties had in contemplation at the inception of the voyage in America. Then if the voyage insured be not infected by what was done in America, it was a legal voyage. The ship originally sailed from Philadelphia to Brest, and then to Bourdeaux, which she might legally do; and before she left the latter place, the treaty between this country and America was ratified; it then appears that in May, 1696, she sailed to Madeira, where she took in other goods, for the purpose of proceeding with the whole cargo to the British territories in the East Indies which then she might well do under the treaty that had before that time been ratified. Then it does not appear Collet had any intention of going to any of our settlements in the East Indies until after the ratification of the treaty. And though we admit that, if there had been any infirmity in any part of the integral voyage, it would have made the whole illegal, so that the assured could not recover upon a policy on any part of it; yet it not appearing that in fact there was any illegality in any part of this voyage, we are of opinion that this objection also fails.

2. *BIRD V. APPLETON.* E. T. 1800. K. B. 8 T. R. 562.

Hence when a ship was insured at and from Canton to [145] Hamburg and was engaged in illegal traffic during her stay at Canton, so effect was given to the policy.

The first count in the declaration was on a policy of assurance on goods on board the Confederacy, an American ship, at and from Canton, in China, to Hamburg or Copenhagen, with liberty to touch, stay, and trade, at all parts and places whatsoever, particularly a port in the Channel, effected by the plaintiffs, for the benefit and on the account of Lessingwell and another. The second count was on a policy on the ship Confederacy, "at and from Canton," and as in the first count. It was stated, that the ship sailed from Canton, having the goods on board, and that she was taken as prize in the course of her voyage, before her arrival at Hamburg or Copenhagen. The defendant pleaded the general issue; and on the trial before Lord Kenyon a special verdict was found. It was objected on the part of the defendant, that the plaintiffs could not recover on this count: 1st. Because the goods insured were purchased with the proceeds of an illegal cargo, that procured at Bombay (it being admitted that the governor's licence to purchase it was illegal), and that such an adventure was contaminated by such antecedent illegal traffic. 2ndly. Because the voyage from Bombay to Canton was only a part of a larger voyage, out and home from London to Canton, and from Canton to Europe; and that as the ship, in the course of the voyage, traded at Bombay, contrary to the treaty between this country and the United States of America, by not returning directly from Bombay to America, the whole voyage was illegal. 3rdly. Because the ship was seizable for a violation of the navigation act in a prior part of the voyage from Bombay to Canton; and consequently that the goods insured were not put on board a proper ship, such a one as the assured impliedly undertook to provide; and that the right of seizure continued at least during the time that the ship was on the high seas, and until her return home. 4thly. Because the sentence of condemnation by the tribunal at Nantz negatived the ship being an American.

Per Cur. The plaintiffs have now given up their claim on the policy respecting the ship; and the defendant has attempted to impeach the policy on the cargo, first, on the ground that the goods insured were purchased with the proceeds of a former illicit cargo; and secondly, on the ground that the foreign sentence is conclusive as to the fact that this was not an American ship. With regard to the first point, arguments *ab inconvenienti* are alone sufficient to determine it. If we were to decide that such a cargo could not be insured, it would be difficult to say to what consequence it would lead; the principle of that decision would equally extend to the second, nay, to the hundredth cargo purchased afterwards, and to the ship itself, so that such a ship never afterwards could become the subject of a legal insurance, even in the hands of subsequent purchasers. We know of no principal of law to warrant such a doc-

trine; and we think that we ought not to establish so inconvenient and absurd a rule. Then it remains to be considered, whether or not the case of *Pollard v. Bell*, 8 T. R. 434, were properly decided? and if it were, whether it ought not to govern the present case? We have heard no arguments to induce us to think that we judged erroneously in determining that case; and it appears to us to be a direct authority for the present. Though the foreign sentence is drawn in an inaccurate and rather a confused manner, we think that the condemnation proceeded solely on the ground that the ship in question had violated some of the French ordinances, and not because she had infringed the law of nations or the particular treaties that subsisted between France and America; therefore, without repeating the reasons given in the case of *Pollard v. Bell*, we think that the decision must govern us in determining this case.

3. *PARKIN v. DICK*. M. T. 1809. K. B. 11 East, 502; S. C. 2 Campb. 221. [146]

A policy was effected on goods, to be thereafter specified, to a certain amount. By the specification it appeared that the goods consisted principally of hardware, but partly of naval stores, the exportation of which was prohibited, under pain of forfeiting the stores, treble their value, and the ship. It was held that the exportation of stores being illegal, all contracts for protecting the stores so exported were impliedly avoided; that the policy was one entire contract on goods to be thereafter specified, to which the underwriter's subsequent assent and specification by the assured could not alter the nature of the contract with respect to the underwriters, so as to sever that which was originally one entire contract. See 12 East, 304; 8 T. R. 46; 1 B. & A. 53. 4. *GIBSON v. SERVICE*. E. T. 1814. C. P. 5 Taunt. 433; S. C. 1 Marsh. 119. And where a valued policy on goods to be thereafter specified is avoided in toto, it applies, if the shipment of any portion specified be illegal.

At the time when the policy was effected the *Washington* and an English vessel named the *Croydon* were both in the port of Liverpool. The *Croydon* took on board a cargo of gunpowder and arms, and before she sailed her owners had given to the officers of the customs at Liverpool security in treble the value of the arms and gunpowder exported, that the same should be expended in trade on the coast of Africa, which is required by the statutes 29 Geo. 2. c. 16. s. 1, 2, 3, and 4. and 33 Geo. 3. c. 2. s. 4. coupled with a proclamation of his Majesty of the 11th of May, 1803. The *Croydon* and *Washington* sailed from Liverpool, but before they sailed it was agreed between their respective owners that the *Croydon* should make over a part of the gunpowder and arms to the *Washington* on the coast of Africa, conceiving it would still make a part of the cargo of the *Croydon*. Chief Justice Gibbs thought that the agreement between the owners of the *Croydon* and *Washington*, that the *Croydon* should deliver to the *Washington*, on the coast of Africa, arms and gunpowder, which she had legally taken on board for trafficking on that coast, was illegal; that it was in effect an illegal exportation by the *Washington*, which had given no security that they should be trafficked with on that coast. The effect was, that the Americans did, by this contrivance, get arms from this country. And a neutral ship meeting by agreement a British vessel in order to receive prohibited goods from her, is sufficient to invalidate the policy.*

Gibbs, C. J. The assured is carrying into effect the illegal act agreed on in this country. I have thought a great deal upon this case since I decided it, and I cannot raise to myself a doubt about the question. In all revenue matters, if a foreigner resident in a foreign country aids to pack the goods for smuggling, he cannot recover the price of them here. The direction is right; it is a fraudulent transaction. The other judges concurred.

5. *PIESCHELL v. ALLNUTT*. E. T. 1813. C. P. 4 Taunt. 792.

The vessel was a *Hamburgher*, and sailed from Gluckstadt on the *Ems*, after a licence granted by the King in council to Messrs. Castendyck and Hentz, on behalf of themselves and others, and permitting a vessel bearing any flag to import a cargo of corn and many other enumerated commodities (not including books), "and no other articles whatever." There were put on board several cases of books, not the property of the assured, nor covered by [147]
As when an insurance is effected on goods from a hostile country.

* But the illegality in some cases may only render the policy void pro tanto; *Glover v. Cowie*, 1 M. & S. 52.

and part of the policy, but on account of one Macdonald, a London bookseller, the freight the cargo is whereof amounted to 43*l.*, being about one-seventh part of the freight of all. licensed by the goods on board, which together amounted to 300 guineas. The ship was the *Crown*; lost on the voyage to London. For the defendant it was objected, that the importation of the books was illegal, unless licenced, and that no licence having been obtained which included them, the defect vitiated the whole adventure, and rendered the vessel and cargo liable to confiscation, and that the insurance was therefore void; and upon this ground the Chief Justice nonsuited the plaintiff, with liberty to move to enter a verdict for the amount of the defendant's subscription.

Per Cur. In the Court of Admiralty, if the ship, goods, and books had been labelled, the books would have been condemned, and the ship and other goods would have been restored; and if they ought to be restored we can find no ground why they should not be insured. We are also of opinion that this adventure required no licence, it not being within the operation of the order of the 6th of April, 1806, that being relaxed by the subsequent order added to; and we are also of opinion that the circumstance of the books being on board, which belonged to Macdonald, the bookseller, does not render the whole of the adventure illegal, nor the insurance void. See 6 Taunt. 498; 2 Marsh, 196.

6. *BIRD v. APPLETON*. E. T. 1800. K. B. 3 T. R. 562. S. P. GILL v. DUNLOP. E. T. 1800. K. B. 7 Taunt. 204. 2 Marsh, 453.

Or where the voyage is clearly distinct and separate from that which is affected by the illegality.

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The first count in the declaration was on a policy of assurance on goods on board the *Confederacy*, an American ship, at and from Canton, in China, to Hamburg or Copenhagen, with liberty to touch, stay, and trade, at all ports and places whatsoever, particularly a port in the Channel, effected by the plaintiffs for the benefit and on the account of Lessingwell and another; the second count was on a policy on the ship *Confederacy*, at and from Canton, &c., as in the first count. It was stated that the ship sailed from Canton, having the goods on board, and that she was taken as prize in the course of her voyage before her arrival at Hamburg or Copenhagen. The defendant pleaded the general issue; and on the trial before Lord Kenyon a special verdict was found. It was objected on the part of the defendant that the plaintiffs could not recover on this count: 1st. Because the goods insured were purchased with the proceeds of an illegal cargo, that procured at Bombay (it being admitted that the governor's licence to purchase it was illegal), and that such an adventure was contaminated by such antecedent illegal traffic. 2ndly. Because the voyage from Bombay to Canton was only a part of a larger voyage, out and home, from London to Canton, and from Canton to Europe; and that as the ship in the course of the voyage traded at Bombay, contrary to the treaty between this country and the United States of America, by not returning directly from Bombay to America, the whole voyage was illegal.—3rdly. Because the ship was seizable for a violation of the navigation act in a prior part of the voyage from Bombay to Canton; and consequently, that the goods insured were not put on board a proper ship, such a one as the assured impliedly undertook to provide; and that the right of seizure continued at least during the time that the ship was on the high seas and until her return home. 4thly. Because the sentence of condemnation by the tribunal at Nantz negatived the ship being an American.

Per Cur. The plaintiffs have now given up their claim on the policy respecting the ship, and the defendant has attempted to impeach the policy on the cargo, first, on the ground that the goods insured were purchased with the proceeds of a former illicit cargo; and, secondly, on the ground that the foreign sentence is conclusive as to the fact that this was not an American ship. With regard to the first point, arguments *ab inconvenienti* are alone sufficient to determine it. If we were to decide that such a cargo could not be insured, it would be difficult to say to what consequences it would lead; the principle of that decision would equally extend to the second, nay, to the hundredth cargo purchased afterwards, and to the ship itself; so that such a

ship never could afterwards become the subject of a legal insurance, even in the hands of subsequent purchasers. We know of no principle of law to warrant such a doctrine, and we think that we ought not to establish so inconvenient and absurd a rule. Then it remains to be considered, whether or not the case of *Pollard v. Bell* were properly decided? and, if it were, whether it ought not to govern the present case? We have heard no arguments to induce us to think that we judge erroneously in determining that case, and it appears to us to be a direct authority for the present. Though the foreign sentence is drawn in an inaccurate and rather a confused manner, we think that the condemnation proceeded solely on the ground that the ship in question had violated some of the French ordinances, and not because she had infringed the law of nations or the particular treaties that subsisted between France and America; therefore, upon the authority of *Pollard v. Bell*, we think that the decision must govern us in determining this case. See 4 Taunt. 856.

(I) RELATIVE TO VALUED, OPEN,* AND WAGERING POLICIES.

(a) *Open and valued policies.*

1. *CRAUFORD v. HUNTER*. M. T. 1798. K. B. 8 T. R. 13.

The question was, the insurance being on Dutch prize ships, whether a count in the declaration, averring that the plaintiffs, as commissioners for the disposal of Dutch ships and effects, made the insurance and that the said ships, or any of them, were not belonging to his Majesty or any of his subjects, was good? This point came on upon a demurrer; and, after argument, is an open

* When the value of the thing insured is not specified, it is termed an open policy; that is, an insurance open to inquiry as to the amount of the interest of the insured in the property insured. The value of the goods or ship is frequently inserted in the policy, in which case the policy is called a valued policy. The only material difference between an open and a valued policy is, that in case of litigation the insured must, in support of an action on a policy, prove in the first instance the amount of his interest in the property insured; but on the trial of an action on a valued policy, such amount is *prima facie* admitted, and no such evidence is necessary, though the underwriter is still at liberty to dispute the amount of the interest, if he can show that it has been grossly overrated. Ship and freight are usually insured by valued policies. In the case of a ship, the value is said to be what she is worth at the port where the voyage commences, including all her stores, outfits, and money advanced for seamen's wages, the whole covered with the premium of insurance, commission for effecting the same (if insured), and charges of recovery in case of loss, when required; *Stev. 268*. In the case of freight, it is said that the freight ought not to exceed the amount of what the ship would earn, with the premium and commission thereupon; see 13 East, 826. Or, in other words, the interest is the amount of the manifest or freight list, covered with the premium, &c., and charges of recovery in case of loss, where those charges are stated in the policy; *Stev. Av. 170, 171*. The term "freight," used generally in a policy, means the gross freight: the usage has been to calculate losses in that mode in the case of open policies on freight; and on a late occasion the insured recovered the gross freight, although, if the ship had arrived in safety, he must have paid a considerable sum for seamen's wages, pilotage, light dues, tonnage, duty, and dock dues; 1 Bing. 61. 2 East, 581. But, although the rules just mentioned have prevailed to a great extent, they have been objected to on the ground that the indemnity afforded by insurance ought to place the insured in the situation in which he would have been on arrival, if no loss had happened, not in that in which he was at the commencement of the voyage; and that by these calculations of ship and freight, the insured would become a gainer instead of being only indemnified. To give the value of the ship, therefore, it is said the probable wear and tear should be deducted from the value at the commencement of the voyage. Three modes have been suggested, viz. 1st. An insurance of the ship, with her rigging, but without her outfit, such as provisions for the voyage, wages, &c., deducting the wear and tear of the ship, because (it is said) the wear and tear would be included in the gross freight; but this mode is still objected to, as giving the insured more than an indemnity. 2dly. An insurance of the ship for her full value at the time of the departure, including the outfit, and of the net freight. This mode is said to be attended with inconvenience, as the sums insured would not be the same as those for which the ship and freight would be contributory to general average. 3rdly. To insure ship and freight jointly in the same policy as one indivisible risk; see *Benecke*, p. 59. It does not appear to be always practicable to adopt this course, as the ship and freight may exist in the hands of different persons. When it can be effected, it appears preferable, as it prevents those difficulties which might occur with respect to the different rights of the insurers on ship or freight. The insurer upon ship and freight may engage to put the owner, under all circumstances, in the same situation as he would have been in the case of safe arrival. One of these two latter methods, therefore, appears to come the nearest to an exact indemnity.

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Lord Kenyon said: This question depends on the construction of the statute 19 Geo. 2. c. 37; for, notwithstanding the argument, I think at common law a person might insure without having any interest; but the preamble and enacting parts of the statute remove all doubt; for the act recites the mischiefs and inconveniences that had arisen from the making of assurances, interest or no interest, and then it enacts (not declaring) that no such assurance shall be made, except in certain cases, which for very wise and politic reasons were excepted; therefore, I am satisfied that this count is good, unless it be on an insurance prohibited by that statute. But that statute only applies to ships belonging to his Majesty, or any of his subjects, and does not extend to foreign ships. The defendant's counsel then wished the Court to consider these ships as belonging to the government of this country; but that cannot be, for the property in captured ships is not altered before condemnation in the Court of Admiralty.

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But where
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specified in
the policy,
it super-
sedes the
necessity of
proving the
amount.

2. LEWIS v. RUCKER. E. T. 1761. K. B. 2 Burr. 1167.

This was an action brought upon a policy by the plaintiffs, for Mr. James Bourdieu, upon the goods on board a ship called the Vrow Martha, at and from St. Thomas's Island to Hamburg, from the loading at St. Thomas's Island and until the ship should arrive and land the goods at Hamburg. The goods, which consisted of sugars, coffee, and indigo, were valued at 30*l.* per hogshead the clayed sugars, and 20*l.* per hogshead the Muscovado sugars, and the coffee and indigo were likewise respectively valued. The sugars were warranted free from average under 5*l.* per cent., and all other goods free from average under 3*l.* per cent., unless general, or the ship be stranded. In the course of the voyage the sea water got in, and when the ship arrived at Hamburg it appeared that every hogshead of sugar was damaged. The damage the sugars had sustained made it necessary to sell them immediately, and they were accordingly sold; and the difference between the price which they brought by reason of the damage, and that which they might then have been sold for at Hamburg, if they had been sound, was as 20*l.* 0*s.* 8*d.* per hogshead is to 23*l.* 7*s.* 8*d.* per hogshead; i. e. if sound, they would have been worth 23*l.* 7*s.* 8*d.* per hogshead; as damaged, they were only worth 20*l.* 0*s.* 8*d.* per hogshead.

Per Cur. To make the matter more intelligible, we will first state the rule by which the defendant and jury have gone, and then we will examine whether the plaintiff has shown a better. The defendant takes the proportion of the difference between sound and damaged at the port of delivery, and pays that proportion upon the value of the goods specified in the policy, and has no regard to the price in money which either the sound or the damaged goods bore in the port of delivery. He says, the proportion of the difference is equally the rule, whether the goods come to a rising or a falling market; for instance suppose the value in the policy 30*l.*; they are damaged, but sell for 40*l.*; if they had been sound, they would have been sold for 50*l.*. The difference is a fifth. The insurer, then, must pay a fifth of the prime cost, or value in the policy (that is, 6*l.*) *E. converso* if they come to a losing market, and sell for 15*l.* being damaged but would have sold for 30*l.* if sound. The difference is one-half; the insurer must pay half the prime cost or value in the policy (that is, 15*l.*) To this rule two objections have been made: 1st objection: That it is going by a different measure in the case of a partial, from that which governs in the case of a total, loss; for upon a total loss the prime cost or value in the policy must be paid. Answer: The distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage; the insurer engages, so far as the amount of the prime cost or value in the policy, that the thing shall come safe; he has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods if they be totally lost; he must pay the prime cost, that is, the value of the thing he insured at the outset; he has no concern in any subsequent value. 2nd objection: The next objection with which this case has been much entangled, is taken from this being a valued policy. We are a little at a loss to apply the arguments drawn from thence. It is said, that a

valued is a wager policy, like interest or no interest; if so, there can be no average, and the insured can only recover as for a total abandoning what is saved, because the value specified is fictitious. Answer: A valued policy is not to be considered as a wager policy, or like interest or no interest; if it was, it would be void by the act of 19 Geo. 2. c. 37. The only effect of the valuation is fixing the amount of the prime cost, just as if the parties admitted it at the trial; but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity. [151]

3. *USHER v. NOBLE*. T. T 1810. K. B. 12 East, 646. *FEISE v. AGUILAR*. E. T. 1811. C. P. 3 Taunt. 507.

In the declaration the loss was thus averred: that the ship having the goods on board was in the river Thames, and before the discharge of the goods at London, by the mere danger of the seas, and force and violence of the tide and winds, and the pressure of other ships, stranded and sunk, and the goods thereby totally lost; the declaration also contained the money counts. The defendant pleaded *non assumpsit*, and paid 14*l.* into court generally upon the whole declaration. At the trial before Lord Ellenborough, C. J., a verdict was found for the plaintiff, for the damages laid in the declaration, subject to the opinion of the Court. In estimating the value of the goods, no goods ought to be taken at the prime cost with the addition of the premium, commission and probable profit. On freight, it should not exceed what the ship might

Per Cur. It is admitted that the assured is entitled to an indemnity and no more; but by what standard of value the indemnity sought should be regulated is the question. In the case of a valued policy, the valuation in the policy is the agreed standard; in case of an open policy, the invoice price at the loading port, including premiums of insurance and commission, is, for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this value. The selling or market-price at the port of delivery cannot be alone the standard, as that does not include premiums of insurance and commission, which must be brought into the account, in order to constitute an indemnity to an owner of goods, who increased the original amount and value of his risk by the very act of insuring. The proportion of loss is necessarily calculated through another medium, namely, by comparing the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case, i. e. it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated proportion of loss to the standard by which the value is calculated, i. e. to the invoice price, being itself calculated as before stated, and you then get the one-half, the one-fourth, or one-eighth of the loss to be made good in terms of money. This rule of calculation is generally favourable to the underwriter, as the invoice price is less in most cases than the price at the port of delivery; but the assured may obviate this inconvenience by making his policy a valued one, or by stipulating that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery. In the absence of any express contract on the subject, the general usage of the assured and underwriters supplies the defect of stipulation, and adopts the invoice value, with the additions we have mentioned, as the standard of value for this purpose. In this case, after receiving the money paid by the West India Dock Company, the assured is left short of his full reimbursement even on the defendant's own calculation, by the premiums of insurance at fifteen guineas per cent. commission and extra costs of suit, for which no allowance was made by the West India Dock Company, so that, *quacunque via data*, the 7*l.* per cent. paid into court is too little. The consequence is, that the verdict must stand, subject to the reference of account to an arbitrator, as agreed by the case.

4. *MARSHALL v. PARKER*. H. T. 1809. N. P. 2 Camp. 69.

Action on a policy of insurance. The plaintiff at first satisfied himself with proving that a cargo of pilchards was put on board the *Cupido*, in Mount's case of a va And in the

ued policy Bay, and putting in a minute of council, which directed a license to be granted for this ship to carry a cargo of pilchards to Leghorn, and a sentence of the French Admiralty Court, whereby the cargo of the Cupido was adjudged good prize, the captors paying freight to the captain, to whom the vessel was ordered to be restored. Lord Ellenborough. From the licence we may presume that the ship sailed for Leghorn, but certainly the plaintiff has not proved that she was captured on her way thither. You must lay a foundation for the sentence; at present it is merely *in vacuo*. Prove the capture, and I will receive the sentence as evidence of the facts on which the condemnation proceeded. The cargo was intercepted on the voyage insured, and though carried into Leghorn, and sold by the consignees, this is the same as if it had been carried into any other hostile port, and disposed of in any other manner. It never reached the agents of the assured. The sale was for the benefit of the captors; nor, without evidence of fraud, can I disturb the valuation.

5. *SHOWE v. FELTORS*. M. T. 1801. K. B. 2 East, 109.

The ship was sea-worthy when she sailed from Liverpool, and it was not disputed that the insurers were interested in the ship and outfit, including provisions and sea-stores, laid in for the slaves which were to be taken in on the coast of Africa, and also wages advanced to the crew to the extent of the value insured. The ship arrived on the coast of Africa, took in a cargo of slaves there, and proceeded to Demerara. In the course of her voyage thither, and in calm weather, she met with a violent concussion, described to resemble an earthquake, from which she received so much damage that it was with the greatest difficulty she was kept afloat by pumping, until she reached Demerara, almost a wreck, where she was obliged to be lashed alongside of a hulk to keep her from sinking; and in attempting to remove her from thence to the shore a few days afterwards she sunk, although the distance was only about fifty yards. At the time of her arrival at Demerara her stores were considerably expended. The ship was originally destined there at the first instance, with directions to the captain to proceed to other ports and places, in case he could not dispose of the slaves there at a certain average price; and his letter of instructions from his owners contained the following direction; "As your vessel is not according to the late act of parliament, we should have you sell her in the West Indies, provided you can procure 1,200*l.*, but expect you will get from 1,500*l.* to 1,200*l.* Should you not dispose of her, you will procure what freight you can for Liverpool." In fact, the vessel having been surveyed at Demerara, and condemned as unserviceable, was sold only for 388*l.* In consequence of this the captain was obliged to dispose of all the slaves there, not indeed so advantageously as he might otherwise have done, had he been enabled to proceed to other places, but still so as to cover the average price to which he was limited by his instructions. The plaintiff gave notice of abandonment to the underwriters, and recovered as for a total loss on the ship, and the verdict was taken for the full amount of the sum insured, it being a valued policy. A rule was obtained to show cause why the verdict should not be set aside and a new trial had, on the ground that the subject matter of the insurance was so much reduced from the original value at the time of the loss, if it were to be considered as a total loss, that the sum valued in the policy ought not to conclude the underwriter.

Per Cur. As the practice of binding parties as to the amount of their interest by valued policies has obtained ever since the statute of 19 Geo. 2, it would require very strong reasons to show that it is wrong; that statute was passed in order to prohibit mere wagering policies, by persons insuring who had no interest in the thing insured, and, therefore, it avoids policies made interest or no interest, or without further proof of interest than the policy itself. The effect, therefore, of a valued policy is not to conclude the underwriter from showing that the assured had no interest, and that, in fact, it was a mere wagering policy within the statute, but in order to avoid disputes as to the quantum of the assured's interest. The parties agree that it shall be estimated at

* Or a return of premium for short interest; 4 Bro. P. C. 450.

Or can any allowance be made in the case of a valued policy for a diminution of stores and provisions, or for the ordinary consumption of the crew;*

a certain value. Here it is not pretended that the subject matter of the insurance was not at first of the value estimated in the policy. Then how does this differ from the case of an open policy in this respect? Would it not be sufficient for the assured in an open policy to prove that at the time the ship sailed, the subject matter of the insurance was of such a value? Is not that the period to look to, and not the state of the thing at the time of the total loss happening? If, on account of the peculiar nature of an African voyage, there ought to be a difference in this respect between these and other trading adventures, the underwriters may if they please introduce a special clause in the policy, to provide for the diminution in value by the expenditure of stores and provisions in the purchase and sustaining of the slaves. As it stands at present there appears no ground for making any such distinction.

6. *BOUSFIELD v. BARNES*. T. T. 1815. N. P. 4 Campb. 228.

Action on a policy of insurance. The defendant's counsel contended that this action could not be maintained, as the plaintiff had already received the full amount of the sum at which the ship was valued by the policy on which the action was brought. The plaintiff was estopped to say to the underwriters on this policy, that the ship was worth more than 6,000*l.*; and, therefore, by receiving that sum, he was fully indemnified; *Godsall v. Baldon*, 9 East, 62.

Lord Ellenborough. I think the valuation in this policy is only conclusive in settling a loss upon it between the assured and the underwriters who have subscribed it, without taking into consideration what has been transacted between the assured and third persons. If a total loss happen, these underwriters shall not pay more than the amount of the valuation; and if there be a partial loss, the valuation regulates the amount of the average contribution. I will likewise take care that the assured has received from another quarter the amount of the valuation in that policy, unless this amounts in point of fact to a complete indemnity.

7. *FORBES v. ASPINALL*. H. T. 1811. K. B. 13 East, 323.

Motion for a new trial in an action upon a policy of insurance at and from any port or ports in Hayti to Liverpool, &c., on freight valued at 65,000*l.* The ship had sailed from Liverpool to Hayti, with a cargo intended for barter, had bartered away part of her outward cargo, and taken in fifty-five bales of cotton in part of her return cargo, and was proceeding from one port in Hayti to another, viz. from Zaquemel to Au Cayes, to barter away the residue of her outward cargo, and to complete her lading home, when she met with an accident by the perils of the seas, which occasioned a total loss.

Per Cur. If the plaintiffs be only entitled to a satisfaction for a partial loss, that satisfaction has already been made, and a nonsuit should be entered. But the plaintiffs contend, that as this was a valued policy, and as part of the goods to be carried upon the freight insured were on board at the time of loss, they are entitled to claim their verdict for a total loss. Freight is the profit earned by the shipowner in the carriage of goods on board his ship, and an insurance upon freight is an insurance made in order to secure that profit to the shipowner, in case he is prevented by any of the perils insured against from actually earning such profit. An insurance upon freight has no reference to the hull of the ship, or to its outfit for the voyage, both of which are protected by insurance upon the ship; but its sole object is to protect the assured from being deprived by any of the perils insured against of the profit he would otherwise earn by the carriage of good. To recover, therefore, in any case upon a policy on freight, it is incumbent on the assured to prove that, unless some of the perils insured against had intervened to prevent it, some freight would have been earned; and where the policy is open the actual amount of freight which would have been so earned limits the extent of the underwriter's liability. In every action upon such a policy evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight; and in either case, if the policy be open, the sum payable to

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Tho' it is no defence to prove that the insured have already received the amount of the valuation from the insurers of another policy, if the value of the ship be equal to the sum received, and that ought to be recovered;

But a valued policy may be opened by showing that part only of that intended by the valuation has been lost;

- [155] the shipowner for freight, together with the premiums of insurance and commission thereupon, is the extent to which the underwriters are chargeable. In this case, therefore, as there was no contract under which the shipowner could claim freight but for goods actually shipped on the homeward voyage, the assured could have made no claim, had this been an open policy, but to the extent of the actual freight on the fifty-five bales of cotton which were shipped for this country, and of the premiums and commission thereon. The question then is, whether it made any essential difference, that is, the case of a valued policy? And we are of opinion, upon full consideration, that it does not. The object of valuation in a policy is, to fix by agreement between the parties an estimate upon the subject insured, and to supersede the necessity of proving the actual value by specifying a certain sum as the amount of that value. In fixing that sum, if the assured keep fairly within the principle of insurance, which is merely to obtain an indemnity, he will never go beyond the first cost, in case of the goods adding thereto only the premium, and if he think fit the probable profit; and in the case of freight, he will not go beyond the amount of what the ship would earn with the premiums and commission thereupon. The valuation, however, in the case of goods, looks to *all the goods intended to be loaded*; and in the case of freight, it looks to *freight upon all the goods* the ship is intended to carry upon the voyage insured; and if by the perils insured against in a valued policy on goods, part only of the goods intended to be covered be lost, the valuation must be opened, and the assured only recover in respect of that part; and so, if by the perils insured against the freight of part only of the goods to be carried be lost, the assured can only recover, in respect of that loss, according to the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation. The proposition is monstrous. Instead of confining the policy, as it ought to be confined, to a contract, as nearly as may be, of indemnity against what may be lost in respect of freight by the perils insured against, it converts it into a contract of indemnity against a different class of accidents which may operate to prevent the assured from being able to prove a full cargo upon freight, and may make it the interest of the assured, which it never ought to be, that a loss should happen. The Court, therefore, will look for very strong authorities before they yield to such a proposition. It was pressed upon the argument, that in the case of a valued policy, if any interest be proved to be on board, and there be no fraud, a total loss will entitle the assured to recover the sum specified in the valuation. And to that position we accede, with this limitation, that is, provided there is a total loss, by any of the perils insured against, of the whole subject matter of insurance to which the valuation applied, viz. of all the intended cargo of goods when the insurance was on goods, and of all the intended freight when the insurance was on freight. But if it be meant to carry that position to this extent, that the underwriter is not at liberty to inquire what was intended to have been included in the valuation, or, when he has ascertained that point, and he cannot reduce the sum below the valuation, by proving that a part only of what was included in the valuation has been lost by a peril insured against, we deny the position
- [156] when so extended. In *Shaw v. Felton*, 2 East, 109, which has been so strongly relied upon, the interest of the assured was in the ship and outfit, including provisions and sea stores, laid in for slaves, and wages advanced to the crew; and the chief ground insisted upon for opening the policy was this,—that the principal part of the provisions had been consumed in the voyage, and therefore had not been lost by the perils insured against. But that ground was resisted with effect, because the subject insured was to be considered as of the value ascribed to it when the voyage commenced; and if the diminution of the provisions were to be allowed to reduce the extent of the underwriter's liability upon the policy, every valued policy upon the ship would be to be opened, because every day after the voyage commenced the quantum of the ship's provisions would be proportionably reduced.

8. HAIGH V. DE LA COUR. H. T. 1813. N. P. 3 Campb. 319.

The defendant had signed an adjustment on invoices and bills of lading being produced to him, which had been furnished by the assured, representing that goods above the value of 5,000*l.* had been shipped by them on board the *Maria*. These invoices were now proved to have been fictitious, and the bills of lading to have been interpolated after they were signed by the captain. In fact, goods were shipped by the bankrupts to the value of 1,400*l.* and no more. The ship was afterwards run away with, and carried to the West Indies, where the cargo was disposed of by a person whom the bankrupts put on board in the quality of a supercargo. Sir James Mansfield, C. J. If the bankrupts intended from the beginning to cheat the underwriters the assignees can recover nothing. The fraud entirely vitiates the contract.

9. USHER V. NOBLE. T. T. 1810. K. B. 12 East, 639.

Action on a policy of insurance; the declaration averred: "that the ship, having the goods on board, was in the river Thames; and before the discharge of the goods at London, by the mere danger of the seas, and force and violence of the tide and winds, and the pressure of other ships, stranded and sank, and the goods thereby totally lost." The declaration also contained the money counts. The defendant pleaded *non assumpsit*, and paid 140*l.* into court generally upon the whole declaration. The jury found a verdict for the plaintiff, subject to the opinion of the Court. On motion to set the verdict aside: *Per Cur.* It is admitted that the assured is entitled to an indemnity, and no more; but by what standard of value the indemnity sought should be regulated is the question. In the case of a valued policy, the valuation in the policy is the agreed standard; in case of an open policy, the invoice price at the loading port, including premiums of insurance and commission, is, for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this value. The selling or market price at the port of delivery cannot be alone the standard, as that does not include premiums of insurance and commission, which must be brought into the account, in order to constitute an indemnity to an owner of goods, who had increased the original amount and value of his risk by the very act of insuring. The proportion of loss is necessarily calculated through another medium, namely, by comparing the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case, i. e. it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated proportion of loss to the standard by which the value is calculated, i. e. to the invoice price, being itself calculated as before stated, and you then get the one-half, the one-fourth, or one-eighth of the loss to be made good in terms of money. This rule of calculation is generally favourable to the underwriter, as the invoice price is less, in most cases, than the price at the port of delivery; but the assured may obviate this inconvenience, by making his policy a valued one, or by stipulating that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery. In the absence of any express contract on the subject, the general usage of the assured and underwriters supplies the defect of stipulation, and adopts the invoice value, with the additions we have mentioned, as the standard of value for this purpose. In this case, after receiving the money paid by the West India Dock Company, the assured is left short of his full reimbursement (even on the defendant's own calculation) by the premiums of insurance at fifteen guineas per cent. commission, and extra costs of suit, for which no allowance was made by the West India Dock Company: so that, *quocunque via data*, the 7*l.* per cent. paid into court is too little. The consequence is, that the verdict must stand, subject to the reference to arbitration.

And when the property is greatly over-valued, with intent to defraud the underwriters, the insurance is entirely vitiated, and the insured cannot recover even to the extent of his actual interest.

The standard of value in the case of an open policy is the invoice price at the port of loading, including premium of insurance and commission.

[157] The proportion of loss is calculated by comparing the selling price of sound commodity at the port of delivery, whether the policy be valued or open.

(b) *Wagering policies.**

1. KEMP V. VEYNE. T. T. 1786. K. B. 1 T. R. 304.

Whether a policy is a wagering policy or open interest depends upon the facts and not upon the understanding of the parties.

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The plaintiffs were proprietors of the cargo, but not of the ship. That the ship originally sailed with the cargo on board from Riga, on a voyage to Marseilles; and that an insurance had been effected at Bremen upon the cargo for that voyage, in the course of which she was taken, and brought into Falmouth by an English privateer; that sentence of condemnation had been there obtained, which was afterwards reversed upon the prize having been proved to be a neutral ship; but the expenses of procuring that reversal were ordered by the Admiralty Court to be a charge upon the cargo. The plaintiff's agents accordingly paid the sum of 103*l.* 14*s.* for the expences of reclaiming the ship and cargo, and immediately procured the policy in question to be effected in January, 1781, according to the purport of the memorandum. In the February following the ship set sail from Falmouth, with the original cargo on board, in the prosecution of her voyage to Marseilles; but on the 26th of the same month, before her arrival there, was captured by a Spanish ship, and carried into Ceuta, in Spain, where she was again condemned. An appeal was brought in the superior court of Madrid, which promising to be of long continuance, the cargo, which was of a perishable nature, was ordered to be sold, and the proceeds to be brought into court, to wait the event of the suit. In May, 1783, the vessel was restored by sentence of the Court, and the surplus of the proceeds which arose from the sale of the cargo was paid to the owner, deducting the expences in Spain in prosecuting the appeal; after all the charges paid there only remained twenty-six rix-dollars. As soon as the ship was liberated she sailed from Ceuta to Malaga, in order to refit, and having there made the necessary repairs, set sail for Bremen, and in that voyage was lost. The declaration averred, that "whilst the ship was proceeding in her said voyage from Falmouth to Marseilles, and before she could arrive at Marseilles, she was captured by the Spaniards, and thereby the said ship, and also the goods and merchandises on board her, were totally lost to the plaintiffs." It was objected on the part of the defendant; 1st. That this was not an insurable interest; and 2ndly. That the plaintiffs could not re-

* With respect to wager policies, the Court have observed; Many are the contrivances which men have fallen upon for the gratification of their propensity for gaming; and the uncertain events of maritime adventure afford an obvious and extensive field for the calculation of chances, and the decision of fortune. At common law a wager policy was lawful, 3 Taunt. 515; 8 T. R. 13, but this is now otherwise, as by the statute 19 Geo. 3. c. 37. it is enacted. "That no insurance shall be made on any ship or ships belonging to his Majesty, or any of his subjects, on any goods or effects laden on board such ships, interest or no interest, or without farther proof of interest than policy, or by way of gaming or wagering, or without benefit of salvage to the insurers, that every such insurance shall be void." But by s. 2. it is provided that the insurances on private ships of war, fitted out by any of his Majesty's subjects solely to cruise against his enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the insurer. And by s. 3. it is also provided, "That any effects from any ports or places in Europe or America, in the possession of the enemies of Spain or Portugal, may be insured in the same manner as if this act had not been made." By s. 5. "All sums of money, lent on bottomry or respondentia, upon ships belonging to his Majesty's subjects bound to or from the East Indies, shall be lent only on the ship, or on the merchandize or effects on board, or to be laden on board, and shall be so expressed in the conditions of the bond; and the benefit of salvage shall be allowed to the lender, his agents, or assigns, who alone shall have a right to make insurance on the money so lent; and the borrower shall recover no more on any insurance than the value of his interest in the ship, or in the goods on board, exclusive of the money so borrowed; and in case it shall appear that the value of his share in the ship or in the goods on board doth not amount to the sum borrowed, he shall be responsible to the lender for so much of the money borrowed as he hath not laid out in the ship or goods on board, with interest for the same, together with the insurance, and all other charges thereon, in the proportion which the money not laid out shall bear to the whole lent, notwithstanding the ship and goods be totally lost." And by an action brought by the insured, the plaintiff or his attorney or agent, shall, within fifteen days after he shall be required so to do in writing by the defendant, or his attorney or agent, declare in writing what sum or sums he hath insured or caused to be insured in the whole, and what sums he hath borrowed at respondentia or bottomry for the voyage, or any part of the voyage, in question.

cover upon the policy in this form of declaring; for they had stated the loss to have happened by capture, whereas, though the vessel was captured, yet having been afterwards restored, she might have reached her destined port, notwithstanding the capture; in which case the underwriters would have been discharged by the terms of the memorandum. [159]

Per Cur. The answers to this case are decisive. 1st. This is a wagering policy, and it is just the same as if the event insured had been the arrival of any other ship at Marseilles. The loss or safe arrival of the ship did not alter the security. The parties were interested in the cargo alone; but the event insured was the arrival of the ship, and not of the cargo. A necessary consequence of this being a wagering policy is, that the insured cannot abandon; but, even supposing it to be a policy on interest, it is enough to say, that in this case the parties never did abandon. In effect, there was only a temporary capture; and though by construction a temporary capture is such a loss as that an assured upon interest is warranted in abandoning at the time, if he please, yet we must consider what the truth of the case was between these parties. Now this was a wagering policy; and in such case there can be no abandonment. But what alone is a fatal objection to the plaintiffs' claim is, that they did not attempt to pursue the voyage to Marseilles, which it was in their power to do after they left Ceuta. The circumstance of the ship's having been captured and detained for a time did not prevent her from prosecuting her voyage after she was liberated; nor is it any excuse that the plaintiffs could no longer control her destination; for in wagering policies, the assured take upon them to perform all that the owners themselves of the vessel could have done in the same situation.

2. *LEWIS v. RUCHER.* E. T. 1761. K. B. 2 Burr. 1167. S. P. *COUSINS v. NANTES.* E. T. 1811. C. P. 3 Taunt. 513.

This was an action brought upon a policy by the plaintiffs for Mr. James Bourdieu, upon the goods on board a ship called the Vrow Mather, at and from St. Thomas's Island to Hamburgh, from the loading at St. Thomas's Island until the ship should arrive and land the goods at Hamburgh. The goods (which consisted of sugars, coffee and indigo) were valued at 30*l.* per hogshead the clayed sugars, at 20*l.* per hogshead the Muscovado sugars; and the coffee and indigo were likewise respectively valued. The sugars were warranted free from average under 5*l.* per cent.; and all other goods free from average under 3*l.* per cent., unless general, or the ship be stranded. In the course of the voyage the sea-water got in; and when the ship arrived at Hamburgh, it appeared that every hogshead of sugar was damaged. The damage the sugars had sustained made it necessary to sell them immediately, and they were accordingly sold; and the difference between the price which they brought, by reason of the damage, and that which they might have been sold for at Hamburgh, if they had been sound, was as 20*l.* 0*s.* 8*d.* per hogshead is to 23*l.* 7*s.* 8*d.* per hogshead (i. e. if sound, they would have been worth 23*l.* 7*s.* 8*d.* per hogshead as damaged, they were only worth 20*l.* 0*s.* 8*d.* per hogshead). *Per Cur.* To make the matter more intelligible, we will first state the rule by which the defendant and jury have gone, and then we will examine whether the plaintiff has shown a better. The defendant takes the proportion of the difference between sound and damaged at the port of delivery, and pays that proportion upon the value of the goods specified in the policy, and has no regard to the price in money which either the sound or damaged goods bore in the port of delivery. He says the proportion of the difference is equally the rule, whether the goods come to a rising or a falling market. For instance, suppose the value in the policy 30*l.*; they are damaged, but sell for 40*l.*; if they had been sound they would have sold for 50*l.* The difference is a fifth. The insurer then must pay a fifth of the prime cost or value in the policy (that is, 6*l.*) *E converso* if they come to a losing market, and sell for 10*l.* being damaged, but would have sold for 30*l.* if sound. The difference is one-half. The insurer must pay half the prime cost or value of the policy (that is, 15*l.*) To this rule two objections have been made: 1st objection. A valued policy is not, therefore, to be considered as a wager policy;

[160] That it is going by a different measure, in the case of a partial, from that which governs in the case of a total, loss; for upon a total loss the prime cost or value in the policy must be paid. Answer: The distinction is founded in nature of the thing. Insurance is a contract of indemnity against the perils of the voyage; the insurer engages, so far as the amount of the prime cost or value in the policy, "that the things shall come safe;" he has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods; if they be totally lost he must pay the prime cost, that is, the value of the thing he insured at the outset; he has no concern in any subsequent value. 2nd objection. The next objection, with which this case has been much entangled, is taken from its being a valued policy. We are a little at a loss to apply the arguments drawn from thence. It is said, "that a valued is a wager policy (like interest or no interest);" if so, there can be no average loss, and the insured can only recover as for a total abandoning what is saved, because the value specified is fictitious. Answer: A valued policy is not to be considered as a wager policy, or like "interest or no interest; if it was, it would be void by the act of 19 Geo. 2. c. 37. The only effect of the valuation is fixing the amount of the prime cost, just as if the parties admitted it at the trial; but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity.

For a wagering policy and a policy on interest are contracts distinct in their nature and incidents. Hence a valued policy, "without further proof of interest than [161] the policy" is good within the stat. 19 Geo. 3. c. 37.

3. COUSINS v. NANTES. E. T. 1811. C. P. 3 Taunt. 513.

Per Cur. On a wagering policy there is no salvage, no abandonment, no return of premium for short interest; it is the interest of the insured that the ship should be lost; but it is the contrary on a policy of interest; there is salvage, there is an abandonment, there is a return of premium for short interest, there it is usually the interest of the merchant to labour for the safety of the vessel. Consequently, it is absolutely necessary, in order to give the underwriter a fair advantage, that he should know that it is a wagering policy.

4. DA COSTA v. FRITH. M. T. 1760. K. B. 4 Burr. 1966.

A policy was underwritten by the plaintiff, being an insurance upon any of the packet-boats that should sail from Lisbon to Falmouth, or such other port in England as his Majesty should direct his packets appointed between Lisbon and England, for one whole year, commencing the 1st of October, 1763, and to continue to the 1st of October, 1764, inclusive, upon any kind of goods and merchandises whatsoever; and it was agreed that the goods and merchandises should be valued at the sum insured on such packet boat, without further proof of interest than the policy, and to make no return of premium for want of interest being on bullion or goods. And in case of loss or misfortune, the insured were to be at liberty to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to the insurance, to the charges whereof the insurers were to contribute, each one according to the rate and quantity of his sum insured. The consideration paid by the insured was ten guineas per cent., and in case of loss they were to abate nothing. N. B. Corn, fish, salt, flour and seed were warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under 5l. per cent.; and all other goods free from average under 3l. per cent. unless general, or the ship should be stranded. In April, 1766, the iron trunk which contained the bullion was fished up, and therefore all the bullion recovered, without any loss or prejudice whatever, and delivered to the defendant. The defendant's expence of salvage amounted to 63l. 8s. 2d.; and deducting that sum for salvage, the net proportion of his share came to 206l. 11s. 9d. The plaintiff's proportion thereof, in respect of his subscription, amounted to 48l. 4s.; which was paid into court. The question was, whether the plaintiff upon this case was not entitled to recover in this action? The Court agreed that this was a policy of a peculiar sort, and within the exception of the stat. 19 Geo. 2. c. 27. It is a mixed policy; partly a wager policy, partly an open one; and it is a valued policy, and fairly so, without

fraud or misrepresentation. Therefore, the loss having happened, the insured is entitled as for a total loss. The insurer agreed to the value, and is concluded to dispute it. The insured has received the money as for a total loss; and there is no want of conscience in retaining it. The cases of *Lewis* and another v. *Rucher*, *Hamilton v. Mendes*, and *Goss* and another v. *Withers*, were "only that where the average loss appears before adjustment, the underwriter shall pay only the real damage." And the reason is, that the insured must show the whole case as it then stood. In the present case there was a total loss at the time of the adjustment. The adjustment in this case makes an end of the question. Here is a solemn abandonment, and a solemn agreement "that the insurers shall be content with salvage in such proportion as the sum insured bears to the whole interest." There was a total loss at the time of the adjustment, which is the same as if the damages had been then recovered on an action. Here is no sort of fraud nor any thing that is against any law; and to refund more than in that proportion would be contrary to the underwriter's own agreement. Therefore, the net proportion only in respect of the plaintiff's subscription, after deduction of salvage, ought to be returned to him; and that is paid into court.

5. *GRANT v. PARKINSON*. M. T. 1682. K. B. 2 Park Ins. 355.

It was an action of insurance on the ship *Providence*, at and from *Surinam*, or whatsoever other ports in the *West Indies* at which the ship might load to *Quebec*. At the trial before *Lord Mansfield*, at the sittings after *Trinity term, 1781*, the principal question on the merits was, whether the plaintiffs had an insurable interest? It was an insurance on the profits expected to arise on a cargo of molasses belonging to the plaintiff, who had a contract with government to supply the army with spruce beer. *Lord Mansfield* thought it an insurable interest. But the part of the case which calls for our attention at present was a clause declaring "that, in case of loss, it was agreed that the profits should be valued at 1,000*l.* without any other voucher than the policy." This, it was insisted, rendered the policy void, as well within the letter as within the spirit of the 19 *Geo. 2. c. 37*. *Lord Mansfield*, at the trial, inclined to think that the contract was a fair one; but still he could not get over the objection, the instrument being void on the face of it. His lordship, however, saved the point for the opinion of the Courts, a verdict being entered for the plaintiff, subject to that reference. In *Michaelmas term* following the matter came on to be heard, when, after full argument at the bar,

Lord Mansfield, C. J., said: I have, since the sittings at *Guildhall*, on further consideration, changed my opinion. I then thought the present policy within the act of parliament; I now think otherwise. On the construction of the act, it has been uniformly held that a valued policy is not void. It is incumbent on the plaintiff to prove some interest; but it is not necessary to go into the whole value. In the case of *Lewis v. Rucher* this doctrine was much considered. [Here his lordship read the words above stated, and then he proceeded thus:] This insurance is on the profits of a cargo belonging to a man having a contract to supply the army, and if it arrive the profits are pretty certain. The meaning of the policy is, not to evade the act of parliament, but to avoid the difficulty of going into an exact account of the quantum. I cannot distinguish it from a valued policy; there is no pretence for saying it is a wagering one. The other judges concurred; and the *postea* was given to the plaintiff.

6. *FLINT v. LE MESURIER*. H. T. 1796. K. B. 2 Park, 355.

In a case before the late *Lord Kenyon*, where the interest was stated in the policy to be "on the commissions of the plaintiff as consignee of the cargo, valued at 1,500*l.*," his lordship expressed a strong opinion that this was a good insurable interest; but the matter being compromised, it did not come to any decision.

7. *KENT v. BIRD*. H. T. 1778. K. B. Cowp. 737.

This was an action upon a policy. It was made subsequent to the stat. 14 *Geo. 3. c. 48*. by which "all insurances upon lives, or any other event or

[162]
A valued policy on profits expected up on a voyage is not an act within the act;

Nor is a commission expected as a consignee of a cargo, a wager within the act;
But a very small interest, where

[163]
the intent
of the par-
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dently been
to enter
into a wa-
ger policy,
will not
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the statute.

events, without interest in the parties, are made null and void." The question reserved therefore at the trial was, whether this were a policy within the act? and if the Court should be of opinion that it was, then a nonsuit was to be entered. It was insisted the statute did not extend to this case; that it was not only not a policy, but the subject matter itself incapable of insurance; and that the nature of the act, not the form of the instrument, ought to decide. But this was a mere wager reduced in writing, not upon any future contingency, but upon a fact then existing; and, therefore, to construe it a policy within the meaning of the statute, would be to extend the act to all wagers where the parties for greater security might think proper to reduce them into writing.

Lord Mansfield stopped the counsel for the defendants, saying, it was too clear to give themselves any trouble. The parties themselves have called it a policy, it is indorsed as a policy, opened as a policy, and any number of persons whatever might have subscribed it as such. Therefore, it is clearly within the act, and a nonsuit ought to be entered. *Per Cur.* Let a nonsuit be entered.

Insurance
upon the
ship and
goods of
foreigners
are not
within the
stat. 19
Geo. 2. c.
37.

8. CRAUFORD V. HUNTER. M. T. 1798. K. B. 8 T. R. 14.

The insurance being on Dutch prize ships, whether a count in the declaration, averring that the plaintiffs, as commissioners for the disposal of Dutch ships and effects, made insurance, and that the said ships, or any of them, were not belonging to his Majesty or any of his subjects, was good? This point came on upon a demurrer; and after argument,

Lord Kenyon said: This question depends on the construction of the stat. 19 Geo. 2. c. 37; for, notwithstanding the argument, I think at common law a person might insure without having any interest; but the preamble and enacting part of the statute remove all doubt; for the act recites the mischiefs and inconvenience that had arisen from the making of assurances, interest or no interest, and then it enacts (not declaring) that no such assurance shall be made, except in certain cases, which for very wise and politic reasons were excepted. Therefore, I am satisfied that this count is good, unless it be on an insurance prohibited by that statute. But that statute only applies to ships belonging to his Majesty or any of his subjects, and does not extend to foreign ships. The defendant's counsel then wished the Court to consider these ships as belonging to the government of this country; but that cannot be, for the property in captured ships is not altered before condemnation in the Court of Admiralty. It was formerly thought that a valued policy was a wager policy, like interest or no interest; but this idea is now exploded.

A policy is
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And its
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(J) RELATIVE TO THE CONSTRUCTIONS OF THE POLICY IN GENERAL, AND OF THE ADMISSIBILITY OF PAROL EVIDENCE TO VARY OR CONTROL ITS EFFECT.

1. PELLY V. ROYAL EXCHANGE INSURANCE. H. T. 1757. K. B. 1 Burr. 349.

S. P. WOLFF V. HORNCastle. H. T. 1793. C. P. 1 B. & P. 316.

Lee, C. J. said: It is certain that in the construction of policies the *strictum jus* or *apex juris* is not to be laid hold on; they are to be construed largely for the benefit of trade and for the insured.

2. ROBERTSON V. FRENCH. T. T. 1803. K. B. 4 East, 130.

By a policy of insurance, ship and goods were insured at and from all and every port, &c., on the coast of Brazil, and after the 17th of September to the Cape of Good Hope, beginning the adventure upon the goods from the loading thereof abroad; the said ship at all or every port, &c. on the coast of Brazil, and from the 17th September, 1800, and upon the ship in same matter, with liberty to sail to, &c. any places, backwards or forwards, under the Portuguese government, &c., at a premium of four guineas per cent., to return 3l. 10s. should the ship have arrived or the risk have otherwise ceased on or before the 17th of September. On the question, whether the policy only attached on the homeward bound cargo, laden on board at the coast of Brazil, and did not cover a cargo originally taken in at the Cape of Good Hope, and which continued on board after the 17th of September, while the ship was on the coast of Brazil, and after she left it on her return to the Cape? and whether

the policy did cover the ship itself, which was insured in the same manner as ^{peculiar sense distinct from the popular meaning of the words.} the goods?

Per Cur. The most natural construction of the words, if the immediate letter of them were less directly applicable to a cargo taken in on the coast seems to be, to make them apply to a cargo to be carried to the *terminus ad quem*, upon and within the immediate limits of the voyage described in the policy, rather than to a cargo conveyed, as it should seem, in the course of useless circuitry from the place from which the ship originally proceeded before the voyage in question had commenced, continuing, except inasmuch as it might be altered by barter, sale, and exchange on board during the voyage, and to be delivered at the place at which the voyage is at last appointed to terminate. But the question naturally occurs, is there any thing to be found in the policy which assigns to these words a sense thus apparently different from the ordinary grammatical sense of them? And looking, as we are obliged to do, to the policy, and to the policy alone, in order to collect the intention of the parties as to the commencement and duration of the adventure thereby protected, we cannot feel ourselves at liberty to disjoin, in point of effect and construction, the words "at all or any port or place of the coast of Brazil," from the words "from the loading thereof aboard the said ship," by which they are immediately preceded, and with which by the immediate context they appear to us to be necessarily united. If the same words had not been thus incorporated with the body of the text of the printed words, and made to form therewith one entire and continued chain of words, and one unbroken sentence of intelligible expressions, all applicable to the same subject matter, it might perhaps have been open to us to have given them a different meaning, and to have considered them as words written in the margin of the policy, (and applying, therefore, indefinitely to the whole of the policy, and not to any particular part of it,) as usually considered, that is, as controlling the sense of such parts of the printed policy to which in sound construction and by reasonable reference they may appear to apply; as for instance, where the word "ship" is written in the margin of the policy, or "freight" or "goods," in such case the general terms of the policy, applicable to other subjects besides the one mentioned in the margin, are thereby considered as narrowed in point of construction to that one. And this is done in cases where the subject meant to be insured is still more remote from ship and goods, the only subjects of insurance in the printed policy, viz. where the object of the insurance, as declared by the marginal memorandum, is money lent on *bottomree* or *respondentia*, or the like, the meaning of which marginal memorandum may be translated thus: "we mean to insure the subject so named, freight for instance, arising and accruing during the limits of the voyage within described, from the carriage of goods on board the ship within mentioned, against the perils within enumerated, and upon the premium herein specified;" in other words, we adopt the general language of the policy, as far as it may serve to effectuate this object and no further.

3. GRANT v. PONTON. H. T. 1809. C. P. 1 Taunt. 463.

A policy upon a homeward voyage from India, upon goods at and from a foreign port of loading, until the ship's arrival in London, beginning on the adventure upon the said goods from the loading thereof at the foreign port of loading, and so should continue upon the goods until the same shall be discharged. If, then, there is no custom of the trade, there is nothing to alter the plain, fair, grammatical sense of the words. In the other policy the words "backwards and forwards at sea" had considerable force. The plaintiff's counsel in this case contended, that according to a dictum of Lord Mansfield, those words meant only "from Europe to Asia, and from Asia to Europe." But this is a most unnatural interpretation; the words "backwards and forwards at sea," must mean from port to port. It was said by Lord Mansfield, in the case of Gregory v. Christie, "that since the practice had ceased of insuring both the outward and homeward bound voyage in one policy, the words 'backwards and forwards' had ceased to be inserted;" but in the case of Salvador v. Hopkins, 3 Burr, 1707, the insurance was "at and from Bengal to any ports or places where and whatsoever in the East Indies, China, Persia,

Where a charter-party has, by the custom of trade, a definite meaning, an insurance on property under it must be construed with reference to that meaning

or elsewhere beyond the Cape of Good Hope, forwards and backwards, and during her stay at each place, until her arrival at London." There the words must have had the meaning attributed to them in *Grant v. De la Cour*, that is, from port to port, not from Europe to Asia. This discussion no further concerns the present question than to show that the case of *Grant v. De la Cour* does not govern this. The distinction between them is, that there, by necessary construction, all the goods which might be acquired by trading in the course of the voyage, were protected by the policy; in this case, the insurance is on nothing but the goods laden in China, and is to continue on them until the arrival of those goods at London.

4. *UHDE v. WALTERS*. E. T. 1811. N. P. 3 Campb. 16.

In an action on a policy of insurance, on a voyage to any port in the Baltic, the question was as to evidence admitted, to prove that the Gulf of Finland is considered in mercantile contracts as within the Baltic, although the two seas are treated as separate and distinct by geographers.

5. *LETHULIER'S CASE*. M. T. 1701. K. B. 2 Salk. 443. S. P. *CHARRED v. ANGERSTEIN*. E. T. 1805. N. P. Peake. 43. *NOBLE v. KENNOWAY*. M. T. 1780. C. P. S. C. Doug. 510.

Action on a policy of insurance by the defendant at London, insuring a ship from thence to the East Indies, warranted to depart with convoy; the declaration showed that the ship went from London to the Downs, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration, to which it was objected, that there was a departure without convoy. *Per Cur.* The clause, "warranted to depart with convoy," must be construed to the usage among merchants, i. e. from such place where convoys are to be had, as the Downs; and Holt, C. J., *contra*. We take notice of the laws of merchants that are general, not of those that are particular, usages. It is no part of the law of merchants to take convoy in the Downs.

6. *MELLISH v. ANDREWS*. M. T. 1813. K. B. 2 M. & S. 27.

A policy of insurance on goods at and from London, the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders, or any other purpose, and to touch and stay at any ports or places whatsoever and wheresoever. The Court held, that the ship having touched at C. for orders, and gone on to S., a more distant port, for further orders; and having received orders at S., because it was unsafe to land there, to return to G. and wait for orders, might so return to G., without being guilty of a deviation, it being found that she went to S. for orders, in the prosecution of her voyage, and returned to G. to obtain orders as to the farther progress of the voyage, and no fraud being found.

7. *AQUILOR v. ROGERS*. M. T. 1797. K. B. 7 T. R. 423.

Per Cur. If the parties in this case had intended to make an agreement different from that which the words used in that memorandum import, they would have added after arrived, "safely from the enemy's," or some words to that effect. But the words here used are not equivocal, and we ought not to depart from them. It would be attended with great mischief and inconvenience, if, in construing contracts of this kind, we were not to decide according to the words used by the contracting parties. This memorandum must receive the same construction in this action, on the grammatical construction of the words, which is the safest rule to go by.

* But the usage must be general; hence, in *Gabey v. Lloyd*, 3 B. & C. 793: a policy was effected on horses warranted free from mortality and jettison. In the course of the voyage, in consequence of the agitation of the ship in a storm, the horses broke down the partitions by which they were separated, and by their kicking bruised and wounded each other so much that they all died; held, upon special verdict, that this was a loss by a peril of the sea, and that the plaintiff was entitled to recover. It was found in the special verdict that a certain usage with respect to such policies prevailed amongst the underwriters, who subscribed policies at Lloyd's Coffee-house in London, and merchants and others effecting policies there, and that the policy in question was effected at Lloyd's Coffee-house: but it was not found that the plaintiff was in the habit of effecting policies at that place; held, that this usage was not sufficient to bind the plaintiff.

Thus, upon an insurance to the Baltic, evidence

was admitted to show that in mercantile usage the Gulf of Finland is comprehended in the Baltic;

[166] Or that it is not usual for a ship to join convoy until she arrives at a particular place?

And in construing a policy, the particular state of the commerce touching which the insurance is made, may be looked at as a guide. Proof of usage, however, is not admissible to contradict the express stipulations in the policy;

8. *PARKINSON v. COLLIER*. M. T. 1797. K. B. 2 Park on Ins. 416.

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In a policy from London to Port Endick, on the coast of Africa, at six guineas per cent. on the ship till moored at anchor twenty four hours, and on goods till discharged, and safely landed. The ship arrived on the coast on the 6th of May, and was captured by the French on the 10th of June. The barter in the trade is carried on on board the vessel, and the goods afterwards sent on shore in boats, and the guns brought back. In this case the discharge of the cargo had not begun, the guns not having been brought down to the coast, for which purpose it is necessary to have a previous agreement with the king of the country, but no delay had been used. The counsel for the defendant contended, that by the custom of the trade, the risk on the goods, as well as on the ship, expired in twenty-four hours, and that the risk on the cargo while on the coast was protected by the homeward policy, at fifteen guineas per cent.

As to show that by the custom of trade at a particular place, the risk on the goods as well as on the ship expired in twenty-four hours;*

Lord Kenyon refused the evidence, both of the homeward policy, and of this supposed usage (which he had on a former occasion admitted against his own opinion, and on which a new trial had been granted), to qualify the clear and unequivocal language of the policy, which covered the risk till the goods were landed. That if in landing any unnecessary delay had been used, that might amount to something in the nature of a deviation, so as to discharge the insurer; but that did not appear to be the case in the present instance.

9. *WESTON v. EAMES*. H. T. 1808. C. P. 1 Taunt. 115.

The defendant proposed to prove that, at the time of effecting the policy, some of the underwriters objected to the risk on the ship or ships, because they had already underwritten policies to a large amount on goods by the Woolton, which was known to be in the fleet bound from Surinam to London. Whereupon the broker said, "I can bar the Woolton, for here is my letter or orders." This was a letter, in which the plaintiffs expressed their wish that, "as their ship (the Woolton) could not bring the whole proceeds of her cargo, and the captain would of course ship produce upon other ships, their broker should insure for them 3000*l.* on ship or ships, *Surinam to Great Britain.*"—They added, "that they thought they should have a shipment on board the *Minerva.*" Mansfield, C. J., rejected this evidence. The defendant, after this conversation, subscribed the policy on ship or ships. Verdict for the plaintiff. The Court held, that the evidence could not be admitted, without abandoning, in the case of policies, the rule of evidence which prevails in all other cases; and that it would be of the worst effect, if a broker could be permitted to alter a policy, by parol accounts of what passed when it was effected. The Court also observed, that Lord Mansfield says, of misrepresentations, that they must be of a matter collateral to the contract, but that this was part of the contract.

Or that a ship named in the policy was not to be included within its provisions.

10. *RUCKER v. ALLNUTT*. E. T. 1812. K. B. 15 East, 278.

This was a policy of insurance of goods at and from London to any port or ports, place or places, in the Baltic, backwards and forwards, with leave to touch and stay at any ports and places, for all purposes whatsoever.

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Expressions introduced into

Per Cur. A painful and anxious duty is cast upon the Court, to construe an instrument contradictory and redundant in some of its expressions, and penurious in others of them, the obscurity of which arises partly from the imperfection of the language of those who execute it, and partly from the extraordinary and novel risks meant to be covered by it. We are led by habit to put constructions upon certain words in policies, from the common use and understanding of them in other cases; but that will not enable us to construe them with reference to the peculiar nature of the voyage in question. Where the destination of a ship is certain, and the objects of the voyage previously ascertained, we should have no doubt in construing the words of leave to touch and stay at any ports and places for all purposes whatsoever, to mean merely for the purposes of the voyage so ascertained, and not as giving leave to stay

may be extended in construction beyond their ordinary signification with reference to the peculiar situation of the destination.

* Or that the risk was not to commence at the place specified; *Haines v. Knightley*, Skin. 54; S. C. 2 Salk. 444.

at a port for the purpose of speculating as in a coffee-house upon the political state of Europe, but only to touch and stay there for the purposes of that voyage, or to avoid some impending peril. On occasions of this kind, our first duty sitting here is to divest our minds of any prejudice or previous conception, if any, of the case, derived from our former view of the subject at the trial, and to place our judgment in that state of indifference as to any former opinion expressed by us in which it ought to be for the purpose of justice.—Considering, then, that this adventure had no one definite object at the time, but that the ship had to seek her ports of discharge in the Baltic, according to the information to be collected there, we must look at the general words of leave to touch and stay at any port for all purposes whatsoever, not as we should read them in an ordinary policy upon a definite voyage, which would not authorize the ship to stay at a port in the voyage merely for the purpose of procuring information as to her ulterior destination, nor in general for any purpose not connected with the port wherein the stay was made, but with reference to the peculiar nature of this adventure. The general words written, giving leave to touch and stay at any ports for all purposes whatsoever, are certainly words of enlargement beyond the common printed form; and with reference to this adventure, which the assured had to seek information in the Baltic as to the ship's port or ports of discharge, would certainly include a liberty to stay at any port there for information on that subject; and the only doubt has arisen upon the subsequent special words introduced, giving leave to wait for information off any ports, which seemed to us at first to imply an exclusion of waiting for that purpose in any port; but upon further consideration, it now appears to us that the latter words do not necessarily restrain the former, because they provide for something which was not provided for before.

(K) RELATIVE TO THE INCEPTION AND TERMINATION OF THE RISK.

(a) *On goods.*

1. *HULL v. COOPER.* M. T. 1811. K. B. 14 East, 479.

The Court were of opinion that, if a ship be insured at and from a certain place, where in fact she is not at the time, but arrives there after some interval, but the fact is not communicated to the underwriters, who do not call for information on the subject, it is a question for the jury, whether the delay which intervened materially varied the risk? and they held it did not, in a case where the insurance being effected on the 13th of August, in London, on goods at and from Heligoland to the Baltic, she did not sail from the Thames till the 27th, to which was to be added the further time for her reaching Heligoland.

2 *WAY v. MODIGLIONI.* T. T. 1787. K. B. 2 T. R. 30.

The defendant, on the 1st day of March, 1786, had underwritten a policy insurance for 50*l.* at a premium of five guineas per cent. upon the same ship, on the interest and for the account and use of the plaintiff, "at and from Torquay to the banks of Newfoundland, and to any and all port or ports in Newfoundland, and during her stay there, and in port, or at sea, and banking, coasting, and fishing on the bank and shore, until the 20th of October, 1786, inclusive." That afterwards, viz. on the 24th of October, 1786, the policy of insurance in question was tendered to Mr. James Allen, and two other underwriters, with the words "on the banks, or from any ports in Newfoundland to Falmouth, or her ports of discharge in England, with liberty to touch at Ireland, and in any ports in the Channel," which policy, so worded, the said James Allen and the said two other underwriters declined to underwrite; whereupon the broker who effected the same struck out the words, "on the banks, or," and then they underwrote the same; and afterwards on the same day as aforesaid was tendered to the defendant, who underwrote the same for 100*l.* at a premium of two guineas per cent. It was agreed that this insurance was to take up the ship from the 20th of October. On the 1st of October, 1786, the ship left a port in Newfoundland, and went to the banks, fished there till the 7th of October, and sailed from thence on that day to England, and of course never did fish or remain upon the banks after the 20th of October, 1786. The vessel was lost on the 30th of November following, in the course of her voyage homewards.

A policy "at and from" a place does not import that the ship is now there; it is sufficient if she arrive there so soon that the risk be not materially varied. And where a vessel is insured from one port to another, the policy attaches, though she may have left the port before the day specified there in.

Per Cur. Where a policy is made in such terms as the present to insure a vessel from one port to another, it certainly is not necessary that she should be in port at the time when it attaches, but when she must have sailed on the voyage insured, and not on any other. Now what is the case here? The voyage insured is from a port in Newfoundland to England; whereas this vessel sailed to the banks, which was a different voyage. This point has been already decided, in the case of *Wooldridg v. Boydell*, *vide* Bl. Rep. C. B. 231. where it was held, that if a ship insured for one voyage, sails upon another, although in the same tract part of the way, and she be taken before the divided point of the two voyages, the policy is discharged. That was a stronger case than the present; for there the very intention of sailing upon a different voyage than that insured vacated the policy. Here she actually went and fished upon the banks after she sailed from port. [170]

3. *ROBERTSON v. BOOTH*. M. T. 1811. K. B. 12 East, 130; *SPITTA v. WOODMAN*. E. T. 1810. C. P. 2 Taunt. 416; *HORNEYER v. LUSHINGTON*. H. T. 1812. K. B. 15 East, 46.

In an action upon a policy of insurance at and from all, any, or every port and place on the coast of Brazil, and after the 17th day of September to the Cape of Good Hope, upon goods and ship, beginning the adventure upon goods from the loading thereof aboard the ship, and from the 17th day of September, 1800, and upon the ship in the same manner; it appeared that the goods, for the loss of which the plaintiff declared, had been put on board at the Cape. It was holden, that the plaintiff could not recover; for the obvious meaning of the policy was, that the adventure was to attach on goods and ship, after a loading of goods had taken place on the coast of Brazil; and as that circumstance or event never took place in the present instance, the policy of course never attached at all.

4. *LANGHORN v. HARDY*. M. T. 1812. C. P. 4 Taunt. 628.

The vessel, after sailing from Gottenburgh with her cargo, was captured in a manner which made the loss to come clearly within the terms of the policy, if the risk ever attached; but it was proved, that the cargo, like all other colonial produce destined for the Baltic at the present period, had been put on board the ship *Elizabeth* in London, and had not been unloaded and re-shipped on her arrival at Gottenburgh, but continued on board, without being shifted, until and at the time of capture. Conflicting evidence was given by the contending parties upon the point, whether the defendant, at the time of signing the policy, knew that the cargo was put on board in London, and was intended to continue on board during the voyage insured; and the jury, at the time of giving their verdict for the plaintiff for total loss, expressly found, in answer to a question put to them by the Chief Justice, that the defendant at the time of his executing the policy knew this fact. If there had been neither such an express finding nor such evidence in the cause, we could not have given the policy the construction contended for; we cannot make the construction of a written instrument to depend upon the knowledge which the defendants may happen to possess of facts. This is precisely the case of *Spitta v. Woodman*, and both Courts have now determined the point. How can we get over these authorities? If parties will be so careless of suiting the language of their instruments to their transactions, they have no one to blame for their losses but themselves.

5. *RIDSDALE v. NEWNHAM*. H. T. 1815. K. B. 3 M. & S. 456. [171]

A policy of assurance on freight and goods, per ship named, at and from Pontneuf to London, warranted to sail on or before the 28th of October; and on the 26th the ship dropped down from Pontneuf with an incomplete crew for the voyage, and on the 28th reached Quebec, which was the nearest place where she could obtain a clearance, and there completed her crew; and on the 29th obtained her clearance, and sailed the next day. A policy at place at the place.

Per Cur. Although the policy attached at and from Pontneuf, yet when the 28th expired without her sailing, in compliance with the warranty, there was an end of the policy, *quoad* the voyage.—Rule refused.

6. GLADSTONE v. CLAY. E. T. 1814. K. B. 1 M. & S. 418.

A policy on goods at and from X. to Y., from the loading thereof on board wheresoever, attaches upon goods laden previously to arrival at X. though not landed and reloaded there.

Action upon a policy of assurance on goods on board the *Blanchard*, at and from Pernambuco to Maranh, and at and from thence to Liverpool, beginning the adventure upon the said goods from the loading thereof on board the said ship, wheresoever, &c. with liberty for the said ship to touch at any ports whatsoever and wheresoever, &c. and by a memorandum indorsed on the policy, the insurance was declared to be on the goods or specie, both or either, valuing cotton at 10*l.* per bale, and the milree, as converted at Pernambuco, at 75*d.* or 6*s.* 3*d.* each. The action was brought for the loss sustained upon the twenty-six cases of the outward cargo, the amount of which was agreed to be settled out of court, if the plaintiffs were entitled to recover. The question for the opinion of the Court was, whether the policy of assurance on the homeward voyage attached upon the said twenty-six cases of outward cargo so loaded at Liverpool?

Per Cur. Unless we are to pronounce that it is not competent to the parties to a policy, by the introduction of words of the most general and comprehensive meaning, to protect an interest on goods without reference to any particular limits within which they are to be loaded, so that at whatsoever place they may be loaded, if the damage arise within the voyage insured, the underwriter shall be liable, we cannot conceive any words more effectual for attaining that object than the words here used.

7. ROBERTSON v. FRENCH. T. T. 1803. K. B. 4 East, 130.

That a policy on ship and goods "at and from all and every port, &c. on the coast of Brazil," [172] and after 17th of September to Cape of Good Hope," may attach, the loading must be on the coast of Brazil.

By a policy of insurance, ship and goods were insured at and from all and every port, &c. on the coast of Brazil, and after the 17th of September, to the Cape of Good Hope, beginning the adventure upon the goods from the loading thereof aboard the said ship, at all or every port, &c. on the coast of Brazil; and from the 17th of September, 1800; and upon the ship in the same manner, with liberty to sail to any places, backwards and forwards, under the Portuguese government, &c. at a premium of four guineas per cent., to return 3*l.* 10*s.* should the ship have arrived or the risk otherwise ceased on or before the 17th of September. The Court held, that the policy only attached on the homeward bound cargo laden on board at the coast of Brazil, and did not cover a cargo originally taken in at the Cape of Good Hope, and which continued on board after the 17th of September, while the ship was on the coast of Brazil, and after she left it on her return to the Cape. Neither did the policy cover the ship itself, which was insured in the same manner as the goods. The most natural construction of the words, if the immediate letter of them were less directly applicable to a cargo taken in on the coast, seems to be to make them apply to a cargo to be carried to the *terminus ad quem*, upon and within the immediate limits of the voyage described in the policy, rather than by a cargo, conveyed, as it should seem, in the course of useless circuitry from the place from which the ships originally proceeded before the voyage in question had commenced proceeding, except inasmuch as it might be altered by barter, sale, and exchange on board during the voyage, and to be delivered at the place at which the voyage is at last appointed to terminate. But the question naturally occurs, is there any thing to be found in the policy which assigns to these words a sense thus apparently different from the ordinary grammatical sense of them? And looking, as we are obliged to do, to the policy, and the policy alone, in order to collect the intention of the parties as to the commencement and duration of the adventure thereby protected, we cannot feel ourselves at liberty to disjoin, in point of effect and construction the words "at all or any port or place on the coast of Brazil," from the words "from loading thereof aboard the said ship," by which they are immediately preceded, and with which by the immediate context they appear to us to be necessarily united. If the same words had not been thus incorporated with the body of the text of the printed words, and made to form therewith one entire and continued chain of words, and one unbroken sentence of intelligible expressions, all applicable to the same subject matter, it might perhaps have been open to us to have given them a

different meaning, and to have considered them as words written in the margin of the policy (and applying therefore indefinitely to the whole of the policy, and not to any particular part of it) are usually considered; that is, as controlling the sense of such parts of the printed policy, to which, in sound construction, and by reasonable reference, they may appear to apply; as for instance, where the word "ship" is written in the margin of the policy, or "freight," or "goods;" in such case, the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that one. And this is done in cases where the subject meant to be insured is still more remote from "ship and goods," the only subjects of insurance in the printed policy, viz. where the object of the insurance, as declared by the marginal memorandum, is money lent on *bottensree* or *respondentia*, or the like, the meaning of which marginal memorandum may be translated thus: "they mean to insure the subject so named, 'freight,' for instance, arising and accruing during the limits of the voyage within described, from the carriage of goods on board the ship within mentioned, against the perils within enumerated, and upon the premium herein specified. In other words, we adopt the general language of the policy, as far as it may serve to effectuate this object and no farther."

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8. *NONNEN v. REID*. T. T. 1812. K. B. 16 East, 176.

Action against an underwriter upon two policies of insurance upon the ship *Tre Systrar*, valued at 1,106*l*. and on sixty-one casks of sugar, free of particular average, at and from Landsrona to Wolgast, free of capture in either port, at a premium of three guineas per cent. The declaration stated the interest on the ship and goods differently in different counts, but the fourth count on each of the two policies respectively stated the interest to be in one A. E. Berg as to the ship, and A. R. Lorent as to the goods, and averred the loss to be by capture. The defendant pleaded the general issue, and paid the amount of the premium into court. On the count for money had and received, the jury found a verdict for the plaintiffs for 350*l*. The *Tre Systrar* was the property of A. Berg, a Swede; she had been a Danish ship, captured by a British ship of war, and sold by the captors to A. E. Berg, and the sugars were in fact the property of A. R. Lorent. Both Berg and Lorent were Swedish subjects, and the ship and cargo had in fact the usual Swedish documents. The insurance was effected by the plaintiff on account of the proprietors on the 28th of April, 1810, in consequence of orders received for that purpose from Gottenburgh, dated the 17th of April, 1810; and the ship and cargo were both represented by the plaintiff in his instructions to the defendant to belong to one and the same proprietor, all Swedish property. It was also stated by him in the same instructions, that the cargoes had been shipped at Gottenburgh on board the same vessel some months before, and that the said cargo had not been unloaded after its arrival at Landsrona. The ship was originally loaded at Gottenburgh to proceed with her cargo to Landsrona, where she arrived safe on the 18th or 19th of April; and after the order for insurance had been dispatched from Gottenburgh, a part of the cargo was taken out of the ship's hold, and landed on the quay, and replaced in the ship's hold; a sufficient quantity was taken out to enable the custom-house officers at Landsrona to inspect and examine the whole cargo on board, the duties on which were paid. The ship, with the sugars on board, sailed from Landsrona on the 25th of April, 1810, and on the 28th of the same month was captured by a French privateer, and carried into Dantzic, and on the 1st of August, 1810, was condemned by the Imperial Court of Prizes at Paris by a decree. It was objected that the policy never attached upon the subject matter of the insurance, which was on goods at and from Landsrona to Wolgast; whereas, the goods in question were loaded on board before the ship arrived at Landsrona. *Per Cur*. The risk on goods was declared to be at and from the loading thereof aboard the ship. In both instances the goods had been shipped at Gottenburgh on board these vessels respectively some months before

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the voyage insured commenced, but in each instance a part of the cargo was taken out of the ship's hold and landed on the quay and replaced in the ship; and a sufficient quantity is stated to have been taken out to enable the Custom-house officers at Landscrona to inspect and examine the whole cargo on board, the duties of which were paid. This, therefore, was an actual reloading at Landscrona of so much of the cargo as was thought necessary to be taken out in order to ascertain the quality of the whole, and to adjust the amount of the duties to be paid in respect of the whole, and which were paid for the whole accordingly. It is an actual unloading and reloading of part and a virtual reloading of the whole, as far as unloading and reloading were necessary for the purpose of ascertaining and paying the duties at that port which, according to the policy, is to be regarded as the loading port. This circumstance we think distinguishes the present case from *Spitta v. Woodman*, in C. P. 2 Taunt. 416. which authority we followed in *Homeyer v. Lushington*, in Hilary term last. Indeed, if the circumstances had existed in the case of *Spitta v. Woodman* which exist in this, it is to be supposed from what fell from Lord C. J. Mansfield, as reported in 2 Taunt. 423. that it would have received a different decision. In that case it was expressly stated that the cargo was not taken out and reloaded at Gottenburgh. It was argued by the defendant's counsel, that if the goods had been barely loaded and reshipped at Gottenburgh so as to entitle the vessel to have had real papers from that port, perhaps the Court might have supported the plaintiff's claim. Lord C. J. Mansfield says, I think with you, the goods might have been landed and reshipped, and that it is not mere form, for in a certain degree the parties can judge from the outside of the packages whether up to that time any damage has been sustained, and without such examination, if an average loss should arise, it would be almost impossible to determine whether it was sustained before the ship's arrival at Gottenburgh or afterwards. In this case it will be recollected that a more perfect examination of the condition of the goods than what took place was immaterial for the purpose of ascertaining whether any damage had been sustained by the goods before the ship's arrival, inasmuch as the policy is free of average.—The period of time from which the responsibility of the underwriter is to commence as to goods, and to which the policy refers for that purpose, is as well fixed by this partial unloading and reloading at Landscrona, as by a more perfect and entire shipment. There is sufficient for the purpose of supplying a date, which is the only object of the reference in question.

9. *MELLISH v. ALLNUTT*. M. T. 1813. K. B. 2 M. & S. 106.

Policy of assurance on goods at and from G. to the ship's port of discharge, beginning the adventure on the said goods from the loading thereof aboard the said ship.

An insurance upon goods at and from Gottenburgh to the ship's port of discharge in the Baltic, "beginning the adventure upon the load [175] ing thereof on board the ship, the goods must be loaded at Gottenburgh, or the policy never attaches

Per Cur. The question is, whether the words import, that the goods were to be loaded at Gottenburgh, or whether the policy will cover goods laden antecedently, provided they were on board in a loaded state at Gottenburgh. As far as general reasoning and convenience may govern our decision, we must suppose that the making a policy to commence from the loading at a particular port is done in order to exclude the inconvenience of having to determine whether a prior damage may not have arisen to the goods before the commencement of the risk intended to be insured. This inconvenience is excluded by specifying that the loading shall be at a particular port, and the responsibility of the underwriter is thereby narrowed. If by the terms of this policy it had been simply on a voyage at and from Gottenburgh, the adventure would have commenced from the loading at Gottenburgh; and the subsequent words, "beginning the adventure from the loading thereof aboard the said ship," seem to have been introduced for the purpose of clearing up any doubt as to the risk, or rather perhaps for the purpose of making a more specific designation of its commencement. To construe the subsequent words, "from the loading, &c." to mean only the same thing as being loaded, would be giving them no effect; for that would be beginning the adventure at Gottenburgh, without regard to the loading. It seems, therefore, to be the probable con-

struction, that the loading meant must be subsequent to the ship's arrival at the port, and during the time she is at the port whence the voyage is to commence; and then the words "and to continue, &c." will connect. If the word "loading" is to be understood in a grammatical sense as descriptive of an act to be done, and not of the goods being in a loaded state, it can only be applied to one specific place, viz. where the cargo is to be taken on board; whereas, if it is to be understood as being loaded, it will be descriptive of a loading at every place. The former is the more obvious and strictly grammatical construction.

10. GRANT v. PAXTON. H. T. 1809. C. P. 1 Taunt. 463.

A policy upon a homeward voyage from India, upon goods, at and from a foreign port of loading until the ship's arrival in London, beginning the adventure upon the said goods from the loading thereof at the foreign port of loading, and so should continue upon the goods until the same should be discharged.

Per Cur. The policy is upon goods at and from China to all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere beyond the Cape of Good Hope, in port, at sea, in all places, at all times, and in all services, until the ship's safe arrival at London, not at the last place of discharge, an expression which was in the former case relied on for the plain-tiff, as indicating that the ship was to discharge her cargo more than once, beginning the adventure upon the said goods from the loading thereof on board the said ship at China, until the said ship, &c. and goods and merchandizes, &c. shall be arrived at London. Taking the words of this policy, nothing can be clearer than that the goods insured by it are the goods to be put on board at China, and not elsewhere, on the voyage from China to London. But inasmuch as the company may employ the ship, while in their hire, in any vice, the words "to all or any places in port and at sea, in all places, at all times, and in all services," are inserted, to the intent, that although the ship should be used as a ship of war, or in whatsoever employment she might be, or whithersoever the company should send her, still the policy should cover and stay at these goods. The company, it is true, send back the Brunswick on another port or voyage; but this circumstance does not alter the words of the policy, or enlarge the insurance. It might alter the effect of the policy if there were any custom of the trade to warrant it; but not only such is not found, but it is dis-confirmed by the very circumstances of this case, which show that the turning out of the goods at Bombay was owing to the interposition of an extraordinary ac-cident. It never was in the contemplation of the underwriters, or of any man, that a ship once laden with tea, a very valuable cargo, would be unloaded, and employed in war or some other trade. If then there is no grammatical sense of the words in the other policy, the words "backwards and forwards at sea" had considerable force. The plaintiff's counsel in this case contended, that according to a dictum of Lord Mansfield, these words meant only from Eu- rope to Asia, and from Asia to Europe; but this is a most unnatural inter-pretation; the words "backwards and forwards at sea" must mean from port to port. It was said by Lord Mansfield, in the case of Gregory v. Christie, that since the practice had ceased of insuring both the outward and homeward bound voyage in one policy, the words "backwards and forwards" had ceased to be inserted; but in the case of Salvador v. Hopkins, 3 Burr. 1707, the in-surance was "at and from Bengal to any ports or places where and whatso- ever in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope forward and backward, and during her stay at each place, until her ar- rival at London." Here the words must have had the meaning attributed to them in Grant v. De la Cour, that is, from port to ports, not from Europe to Asia. This discussion no farther concerns the present question than to show that the case of Grant v. De la Cour does not govern this. The distinction between them is, that there, by necessary construction, all the goods which might be acquired by trading in the course of the voyage were protected by

* Secus, had it been "forwards and backwards at sea, until the ship's arrival at her last station of discharge," and the adventure out and home; see 1 Taunt. 466.

the policy; in this case the insurance is on nothing but the goods laden in China, and is to continue on them until the arrival of those goods at London.

11. LAMBERT V. LIDDART. E. T. 1814. C. P. 1 Marsh. 149; S. C. 5 Taunt. 480.

On a policy at and from Pernambuco, or any other port or ports in the Brazils, to London, beginning the adventure from the loading of the goods on board the ship on the termination of her cruise and preparing for her voyage to London. The ship, on the termination of her cruise, touched at Pernambuco; but failing to procure a cargo there, she proceeded for St. Salvador and was lost on her voyage thither; held, that the policy attached at Pernambuco.

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On a policy at and from Pernambuco, or any other port or ports in the Brazils, to London, beginning the adventure from the loading of the goods on board the ship on the termination of her cruise and preparing for her voyage to London. The ship, on the termination of her cruise, touched at Pernambuco; but failing to procure a cargo there, she proceeded for St. Salvador and was lost on her voyage thither; held, that the policy attached at Pernambuco.

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The ship on the termination of her cruise touched at Pernambuco; but, failing to procure a cargo there, she proceeded for St. Salvador, and was lost on her voyage thither. In argument it was premised that there were three special qualities in the policy; 1st. That it should commence at the termination of the cruise; 2ndly. That the ship might carry letters of marque; and 3rdly. That she had leave to take in goods at any port or ports in the Brazils. As to the first objection, it was contended that, the ship having been insured at and from Pernambuco, or any other port or ports in the Brazils, the meaning of the policy was, that she should be at liberty to go to any, and any number of, ports on that coast till she had completed her cargo; and that, at the first port at which she should touch, whatever that might be, the policy should attach, and the attaching of the policy could not be affected by any subsequent deviation. The cruise had ended at Pernambuco, and the ship having become a trading ship, the policy attached there. As to the second objection, that the going to St. Salvador was a deviation, it was argued that, by the words of the policy, the ship had a right to go to any number of ports in the Brazils, and in any order, though not in her direct course to London, provided she kept the purpose of her voyage in view, viz. the procuring a cargo to bring to London. They said, this was the same case as if the policy had been from Pernambuco to London, with liberty to go to St. Salvador. In order to support the defendant's proposition, that, having made her election of her port of loading, the ship could not afterwards go to any other port, unless in her direct course to London, the words should have been "at and from Pernambuco and no other port," instead of "at and from Pernambuco, and at any other port or ports." As long, therefore, as the ship remained on the coast of Brazil, she was under no limitation as to the ports she went to. They compared this to the case of *Bragg v. Anderson*, where the Court held that a policy at and from Martinique, and at all or any of the West India Islands, to London, warranted the ship in touching at St. Domingo, though that island was considerably out of her direct course from Martinique to London. As to the last objection, that the voyage was not described in the declaration so as to meet the evidence, it was said, this was in fact a question on the merits, and depended on the second point, which had been reserved; for, if the ship had a right to go to St. Salvador, for the purpose of getting a cargo for London, the voyage was well stated as from Pernambuco to London. At all events, the second count was correct, in averring that the ship was proceeding towards London.

Per Cur. We are of opinion that the words of the policy are sufficient to cover these risks. The ship arrived off Pernambuco, and an officer was sent on shore for the purpose of procuring a cargo: failing in her attempt there, she was proceeding to St. Salvador with the same view, and was lost in that voyage. The defendant objects that, either the policy was not to attach till the ship's arrival at the port of actual loading, and then to be sure it did not attach at all in this case; or else that, having selected Pernambuco as her loading port, she was afterwards guilty of a deviation; and that, even though there might be nothing illegal in that deviation, yet that this was not the voyage insured. We think the words of the policy answer both these objections. If the policy had been at and from Pernambuco, or any other port in the Brazils, there might have been some colour for the defendant's argument; but the alternative being any other port or ports, there must have been a contemplation of her going to more ports than one. The object of the policy must have been to secure the insured from all risks, from the time the cruise ended, while she was receiving her cargo, and till her arrival at London. In the case of

Hogg v. Hörner, the words were not so comprehensive as in the present. It [178] has been objected that, though the cruise was ended, the ship was not preparing for her voyage. We think that, having come to Pernambuco to procure a cargo, and having sent an officer on shore for that purpose, she must be considered as preparing for her voyage, within the words of the policy, and that, therefore, the policy had attached. We also think, that she had a right to go to St. Salvador, for the purpose of procuring a cargo. As to the objection that the voyage was not correctly stated in the declaration, supposing our construction of the policy to be a just one, the voyage might fairly be described as from Pernambuco to London.

12. **HESELTON v. ALLNUTT**. M. T. 1814. K. B. 1 M. & S. 46.

Goods were insured from Heligoland to Memel, with liberty to touch at any ports, and to seek, join, and exchange convoy, warranted free from capture in the port of Memel; and the ship sailed from Heligoland with orders to go to Gottenburgh, to know whether to proceed to Aubolt or Memel, and was captured in her way to Gottenburgh, which is in the track either to Aubolt or Memel. Held, that this was to be considered as a voyage to Memel, although it was subject to be charged according to circumstances upon the ship's arrival at Gottenburgh; and therefore the risk commenced on her leaving Heligoland; and the ship never having reached Gottenburgh, the purpose of going thither for orders was merely an intention to deviate, which did not vacate the policy; neither was there a restraint on the captain's judgment as to the place of seeking convoy, it not appearing that he could have met with convoy before the capture; and consequently the underwriter was liable.

13. **LEIGH v. MATHER**. M. T. 1795. N. P. 1 Esp. 411; S. C. 1 Park Ins. 52.

Action upon a policy of assurance on the ship *Palleser*, and on goods on board thereof, on a voyage at and from Georgia to Jamaica. The ship arrived in Montego Bay, and moored at anchor, and there also the agent of the plaintiff sold and delivered the greatest part of the cargo to Messrs. Adams and Hatton, merchants there; the captain then entered a charter-party, with Adams and Hatton, to proceed from thence to St. Anne's, and there to take in a cargo for London. After unloading the greatest part of the cargo at Montego Bay, and remaining there a month, it was verbally agreed that the remainder of the cargo (which was lumber) should be carried as ballast to St. Anne's; and accordingly the vessel, after taking in some sustick, proceeded towards St. Anne's, but was wrecked, and never arrived there. For the plaintiff it was urged, that in such an insurance the ship might go from port to port; and that, at all events, the goods were protected by the policy, till they were all discharged and safely landed.

Lord Kenyon was clearly of opinion, and was confirmed in that opinion by a special jury, to whom his lordship particularly referred upon this occasion, that the risk on the ship ceased after she had been moored at anchor twenty-four hours. The facts disclosed in this case have manifested that Montego Bay was also the original destination of the cargo, and that its not being wholly delivered there was only prevented by a new agreement; the loss of the goods cannot be recovered under this policy of insurance. A ship insured to Jamaica generally cannot be permitted to go round the whole island, from port to port, for the purpose of unloading her cargo, especially where, as in this case, the owner of the ship and goods is the same person. The plaintiff was nonsuited.

14. **BELL v. HOBSON**. M. T. 1812. K. B. 16 East, 240; S. C. 3 Campb. 272.

Policy on goods at and from G. to any port in the Baltic, beginning the adventure from the loading thereof on board the ship; and the policy was declared to be in continuation of a former policy, which was a policy from H. to her port of discharge in the United Kingdom, or any part in the Baltic, with liberty to take in and discharge goods wheresoever; to return 12 per cent. on the voyage ended at G. On the question, whether the assured were entitled to recover, although the goods were not loaded on board at G., but at V., and although the defendant was not an underwriter on the former policy?

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captain of a
vessel, insu-
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tinique,
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part of the
cargo there
and then
took the
remainder
of it to An-
tigua,
where she
was wreck-
ed while
stopping,
partly to dis-
pose of the
[180]
residue of
the cargo,
and partly
to obtain a
homeward
cargo.
Insurance
on goods
from A. to
B., until
they should
be there
discharged
and safely
landed; on
their arri-
val at B.
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Per Cur. A very strict and certainly a construction not to be favoured, and still less to be extended, was adopted in the case of *Spitta v. Woodman*, where it was holden that the words "beginning the adventure from the loading on board," were to be confined to the place whence the risk commenced. But if there be any thing to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction. Then can there be any thing more indicative of such an understanding between the parties than the statement made at the foot of this policy, that it was a continuation of former policies, which were distinctly upon a voyage from Virginia? This was taking up the voyage from a period in the former policies. The conclusion, therefore, which was drawn in *Spitta v. Woodman*, is completely rebutted by the reference in this policy to an antecedent loading.

15. *J. ENGLISH V. VAUSE.* T. T. 1813. N. P. 3 Campb. 417.

A ship insured to Martinique, and all or any of the windward and leeward islands, landed the greatest part of her cargo at Martinique, and sailed with the residue to Antigua, where she was wrecked while stopping, partly to dispose of the residue of the outward cargo, and partly to obtain a homeward cargo. The plaintiff's counsel contended that the underwriters continued liable on the policy at the time of the loss, as the outward adventure was not then completed. There being no market for the lime and bricks at Antigua, the ship had a right to sail, under the protection of the insurance, to any of the other windward or leeward islands, so that she took them in geographical order, and according to the common course of navigation.

Lord Ellenborough. The captain had no right to mix up together the two objects, of disposing of the remnant of the outward cargo, and procuring a homeward cargo at the risk of the underwriters on the outward voyage. When the disposal of the outward cargo ceased to be the sole reason for stay at Antigua, these underwriters were discharged.

16. *HARRY V. ROYAL EXCHANGE INSURANCE COMPANY.* E. T. 1781. C. P. 2 B. & P. 430; S. C. 3 Esp. 289.

The policy was in the usual form, "from Petersburg to London, on goods, till they should be there discharged and safely landed." The cause was tried before Lord Eldon, Chief Justice, when it appeared that the ship and goods arrived in safety in the river Thames; that the plaintiffs, being the consignees of the goods, by their broker, employed and paid a lighterman belonging to one of the public lighters entered at Waterman's Hall to land the cargo, which was damaged on board the lighter, but without any negligence imputable to the lighterman; that it is the constant practice for merchants in the Russia trade to land their goods by means of lighters; and there are no other lighters now in use among the merchants but the public lighters. A verdict was given for the plaintiffs, with liberty to the defendants to move for leave to enter a nonsuit, upon the ground that the insurers were discharged by the delivery of the cargo to the lighters employed and paid for by the plaintiffs. The case was argued, and three learned judges of that court (Heath, Brooke, and Chambers, Justices) were of opinion that the insurers were not discharged. In giving their opinions, they relied upon the words of the policy and the usage of trade, it being impossible for large vessels to come up to the wharfs to deliver their goods; and these lighters are public lighters, publicly registered, and equally known both to the underwriters and owners of the goods. All the judges expressly said, they had not relied upon the distinction between public and private lighters, a distinction which it seems had been previously taken at *Nisi Prius*, in the case of *Rucher v. The London Assurance Company*, by the late very learned Mr. Justice Buller, and which distinction had never been questioned by any appeal to the Court against that judge's opinion.

17. *RUCHER V. LONDON INSURANCE COMPANY.* E. T. 1784. C. P. 2 B. & P. 432; S. C. 3 Esp. 290.

This was an action on a policy of insurance on the *Eliza Sophia*, at and from Grenada to London, on the ship until moored twenty-four hours, and on goods until safely discharged and landed; and the declaration stated, that be-

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fore the goods, viz. hogsheads of sugar, were safely discharged and landed, ^{chant uses} they, by the perils of the river Thames and the waters thereof, were wa ^{his own} hed away and lost. The several wharfs between London Bridge and the Tower ^{lighter, the} are called free quays, at which only foreign produce, liable to pay duties, can ^{underwriter} be landed. The owners of most of these quays entered into a partnership, ^{is discharg} ed; which was to expire at Lady Day then next, and not only did the business of [181] wharfingers but of lightermen, employing their own lighters in discharging such vessels as were to land goods at their wharfs. The owners of some of the wharfs, not of the company, have also their own lighters, while the owners of others are not possessed of lighters of their own, but employ public lightermen. When a ship arrives in the river, the first thing that is done is to quay the ship; when a ship is quayed at a wharf belonging to one of the company, the company provides lighters, and does all that is necessary for landing; when at a wharf not belonging to any of the company, the owners provide lighters, &c. All the wharfs do not keep lighters or employ the company, but employ persons having lighters but no wharf, as Drinkall, the person who was employed here by the plaintiffs. It is not for merchants to employ lightermen; they usually leave it to the wharfinger; but Hibbert's house (and that only) generally employs one lighterman. The plaintiff applied to the agent for the company of wharfingers to land the sugars in question; but they not being able to undertake the business, and the plaintiff fearing the ship might be kept on demurrage, one Drinkall, who followed the business of a lighterman, was applied to by him, with consent of the company. Drinkall's usual business was to work out rums, and he had been often employed by the company, and in this case was, when applied to, employed by them in working out the ship Experiment, but as a favour he left her to work out the sugars. Drinkall was a public lighterman for hire, and his lighter was numbered at Waterman's Hall, without which no lighter could be allowed to work. On the 30th of September, fifty-seven hogheads of sugar were put on board his lighter, and there were two men on board, which are the usual number for a lighter, and the second mate of the ship; as she was proceeding to the shore she struck upon the anchor of a ship and sunk, through an unavoidable accident, without any imputation of neglect on any body on board. The sugars were, of course, much damaged; and this action was brought to recover an average loss.

Buller, J. I told the jury that the decision of this cause depended on the usage; but the fact of the usage once established, the question, whether the underwriter is liable or not, was matter of law. But it belonged to the jury to say whether what has been done here was or was not in the usual course of trade. There is no distinction between a public and private wharf; for a ship may go to either, and underwriters are equally liable at both. If she goes to a private wharf, the public lightermen are not employed; so that they are cases in which the underwriters would be liable. When the company is not employed, it is merely a voluntary society; and these lighters are not on a different footing in any respect from the rest of the lighters. If then, that is not the line, what is? The line is between lighters which are public, and lighters which are the property of the merchants and work only for them; the public lighters have a stamp of authenticity; they are entered in Waterman's Hall, as Drinkall's was, and have a public credit. The case in *Strange (Sparrow v. Carruthers)* does not interfere. If a merchant will not send public lighters entered at Waterman's Hall, it shall be a delivery to the merchant when the goods are put on board his lighter; but not if he sends lightermen appointed by the Waterman's Company, and who are public officers. In the case in *Strange*, the lighter is said to be the property of the plaintiffs, and one expression of the Chief Justice is, that it would have been otherwise had the goods been sent by the ship's boat, i. e. the lighter of the ship employed to discharge her, for it could not be the ship's boat, literally speaking, because it would be impossible it could discharge a whole cargo. If the jury were of this opinion he directed them to find for the plaintiff.—Verdict for the plaintiff.

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18. **STRONG v. NATALLY.** E. T. 1804. C. P. 1 N. R. 16.

On the arrival of the ship, the goods insured were put on board a lighter hired in the usual way, and brought to a wharf belonging to the plaintiff in the afternoon, but in consequence of the roughness of the weather could not be landed that evening. The lighterman finding that he could not land the goods asked the plaintiff whether he should stay to see the cargo landed; the plaintiff said that he need not do so, for that he (the plaintiff) would look to the landing himself. Accordingly, the lighterman, left the cargo alongside the wharf. In the course of the night the lighter was sunk, without any neglect being imputable to any one; and a watchman in the employment of the plaintiff having discovered the circumstance, immediately gave an alarm.

Per Cur. Whether the owner of the cargo, under the particular circumstances of this case, did not take the cargo into his own care and possession? It seems to us that he did. The goods were brought in the lighter to the plaintiff's wharf, and if nothing had happened to relieve the lighterman from that duty, he would have been bound to set some person to watch over the goods until they should be landed. But the owner of the goods in this case dispensed with the obligation of the lighterman to take charge of them during the night, and took them into his own custody; and while they were in his custody they were lost. Can it be contended then that by such conduct the plaintiff did not discharge the lighterman? If he did discharge the lighterman, he placed himself in the same situation as if the goods had been actually landed and delivered. It is argued that it does not appear that any care could have prevented the accident which happened; as to which, we will only observe, that neither does it appear that the accident might not have been prevented by extraordinary diligence. It appears to us that this case is not distinguishable from that of Sparrow v. Carruthers. There the owner of the goods chose to employ his own private lighter to land them, and by that act he was holden to have discharged the underwriter. The plaintiff in this case chose to take the goods into his own possession before they were landed, and having so done he might have kept them in the lighter for a week, for he had as much control over them as if they had been in his custody for that period. We think the verdict therefore perfectly right.

19. **BROWN v. CARSTAIRS.** M. T. 1811. N. P. 3 Campb. 161.

19. BROWN V. CARSTAIRS. M. T. 1811. N. P. 3 Campb. 161.

Policy on goods at and from London to Archangel, until the goods shall be there discharged and safely landed. The declaration averred that the ship arrived at Archangel; but that before the goods were discharged or safely landed they were seized and detained by the persons exercising the powers of government there. It appeared in evidence that as soon as the vessel arrived at Archangel, her hatches were sealed down, and a Custom-house officer remained constantly on board. Leave was refused to unload the cargo for several weeks; and at last it was unloaded into prooms or lighters belonging to the government, under the inspection of an officer, and lodged in a government warehouse, where the consignees had no control over it, and were not even permitted to see it. The whole was afterwards condemned, on the ground that the ship had come from London, instead of Teneriffe, as was represented by the simulated papers which she carried. It appeared, however, to be the uniform course of transacting business at Archangel, that when a ship arrives, her hatches are sealed down, that a Custom-house officer remains on board till she is unloaded, and that the goods must be carried in the first instance to the government warehouse, where they remain till the duties are paid. Under these circumstances, Lord-Ellenborough was of opinion that there was not any evidence that the goods were seized and detained by the Russian government before they were discharged and safely landed; that the goods were landed according to the usual course of trade at the port of Archangel; and consequently that the underwriters on such policy as the present were not liable for any subsequent loss.

* Where the insured claims and receives the return premium due upon the arrival of the vessel, and the policy is adjusted upon that footing; he cannot without an express stipulation resort again to the underwriters in any contingency of the adventure; see *Holt*, 67.

20. SALVADOR V. HOPKINS. T. T. 1765. K. B. 3 Burr. 1707.

The charter-party was in the usual printed form, and contained a clause empowering the Company's servants abroad to detain the ship a year longer, if they pleased, than the time originally limited by the charter-party. The insurance was in these words: "at and from Bengal to any ports or places whatsoever in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, forwards and backwards, and during her stay at each place, until her arrival at London, on money, &c." On the 25th of March, 1762, the ship sailed; on the 19th of September, in the same year, she arrived at Bombay; and early in the November following she left Bombay. The first time the ship arrived at Calcutta, in Bengal, on the 5th of March, 1763, and on the 28th of the same month the president and council of Bengal entered into a new agreement with the captain, reciting that the charter-party would expire on the 11th of February, 1764, but that the president and council finding it expedient to detain the ship in India, and being desirous of having the time limited in the charter-party prolonged, &c.; the indenture therefore witnesseth that the captain lets the ship to freight for one whole year, from the said 11th of February, 1764. The ship arrived at Bombay a second time in July, 1763; in December following she again sailed for Bengal, and arrived there early in 1764. On the 19th of March in that year she left Bengal in order to proceed for Bombay; and on the 21st of that month, subsequent to the expiration of the old charter-party, the ship was lost; on the 3rd of April, 1764, Mr. Hume, the plaintiff in several of these actions, received a letter from the captain, dated the 14th of April, 1763, inclosing a copy of the new agreement, which letter was publicly read in a coffee-house. The next day to the receipt of the letter some insurances were made by Mr. Hume. On the 17th of July, 1764, other insurances were effected by Mr. Hume; and all the other insurances were made after the captain's letter of the 14th of April, 1763, had been received and publicly read in a coffee-house. The Court, after stating the facts respecting the notorious usage of this branch of trade, enlarged upon the circumstances, peculiarly distinguishing these causes. No mention was made, or question asked, at the time of underwriting, when the ship was chartered? when she sailed from England? when she arrived at India? whether she was detained a year, according to the proviso in the charter-party?—And yet her continuance in the East Indies depended upon all these facts; if they ought necessarily to be disclosed, the policy was void to the knowledge of the underwriters at the time they took the premium. The evidence in all the causes was very strong that her staying a year longer if known would not have varied the premium. This ship was insured at the same premium after the prolongation of her stay in India was known; none of the defendants desired to be off after they knew that an account of the new agreement had been received in England upon the 3rd of April, 1764, which was notorious to them all, before the intelligence of her loss, which came in the October following. So that if there had been any force in the objection, it would have been waived by the acquiescence of the underwriters after they were fully apprised of the whole.

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(b) *On ships.*

1. ANON. E. T. 1780. K. B. Doug. 370. n.

The policy was effected on the ship *Capel*, on the 20th of August, 1776, and was in these words: "At and from Jamaica to London, warranted to have sailed on or before the 1st of August, 1776, to return 5 per cent. if the ship departed with convoy, or 8 per cent. if with convoy for the voyage, and arrived." The first and second counts in the declaration averred, "that the ship sailed before the 1st of August, viz. on the 20th of July, from St. Anne's Bay at Jamaica, where she had been loaded, and taken in her cargo for the said voyage, i. e. from Jamaica to London, ready to perform the said voyage, and proceeded to Bluefields for the purpose of joining convoy there, which was then about to sail for Great Britain." The third count stated, "that she sailed before the 1st of August, viz., &c. from Jamaica aforesaid, on her said island." Under the words "at and from Jamaica," the ship is protected, till her departure on her voyage, her voyage, which is going all round the island.

voyage." It was admitted by the defendant, that the ship had taken in her complete lading and clearances for England, and had sailed from St. Anne's Bay on the 26th of July, on purpose to join the convoy there, and proceed to England; that she arrived at Bluefields on the 28th or 29th of July, where she was detained till beyond the day in the warranty in pursuance of a proclamation from the governor and council of Jamaica for a general embargo; that afterwards, having had sailing orders, she proceeded with the convoy for England, and on her passage, being separated from the convoy, was taken by an American privateer. Bluefields was the usual place of the rendezvous of the King's ships and convoy on the Jamaica station; but the greater part of the course from St. Anne's to Bluefields was out of the direct road to England.—A verdict having been found for the defendant, the case was argued on two several days, by Dunning and Buller for the plaintiff, and Wallace and Baldwin for the defendant. The two points made for the defendant, were, 1st. That there was no departure till after the day in the warranty; 2nd. That if

[185] there was, the going to Bluefields was a deviation. After the first argument, Lord Mansfield said, it seemed to be a new question, whether a ship going expressly for the purpose of getting convoy out of the course of the voyage, is to be considered as in the prosecution of the voyage insured, or whether this is a deviation? He, therefore, directed that the cause should stand over to look for cases on that subject.

Lord Mansfield delivered the opinion of the Court as follows: Upon consideration of all the circumstances of this case, we are satisfied that the voyage from Jamaica to England began from St. Anne's. On sailing, the ship had no object but to make the best of her way to England. She touched at Bluefields only, as being the safest way she could take. It is manifest, from the value of the property depending on this trial, that it was considered by all the other shipping as the safest measure to be observed, and that the contrary would have been unwise and imprudent. The great distinction (and on which we found our opinion) is, that she left St. Anne's for England, with her cargo, papers, master, &c. on board, and did not sail to Bluefields as a distinct port. If she had gone there for any purpose independent of the immediate prosecution of her voyage, as for instance, to take in water, letters, or even to wait for convoy, none being there, that would have made a great difference; there would then have been a coasting voyage to Bluefields, and another from thence to England. But here we think the only object was to take the safest course to England from St. Anne's. The rule must be made absolute.

2. CRUIKSHANK V. JORDON. E. T. 1810. C. P. 2 Taunt. 301.

A ship
whilst mov-
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port to port
in an island
is covered
by a policy
at and from
the island.

Policy at and from Jamaica to London. The ship was warranted to sail after the 12th of January; and on or before the 1st of August it appeared that the vessel was at anchor at Port Maria, in the island of Jamaica, for the purpose of taking in her cargo. Port Maria is considered as a very hazardous station for ships; and as soon as the vessel was completely loaded, and before the 12th of January, the master sailed for Port Antonio, an accustomed rendezvous in the same island, intending to wait there for convoy. In going thither the ship was lost. The defendant at the trial contended, that the moving and putting the ship within the dangers of the sea before the 12th of January, was a breach of the warranty, which put her out of the protection of the policy. The jury, however, found a verdict for the plaintiff. The Court held that there was no ground for the motion, and that under the word "at," a ship moving from one port to another in the same country is protected; and they refused to grant the rule.

3. LEIGH V. MATHER. M. T. 1795. K. B. 1 Park Ins. 52. S. P. BARRASS V. LONDON INSURANCE COMPANY. 1782. E. T. K. B. 1 Esp. 411.

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The out-
ward risk
upon a ship
ceases after
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Action upon a policy of assurance on the ship Palliser, and on goods on board thereof, on a voyage at and from Georgia to Jamaica. The ship arrived in Montego Bay, and moored at anchor, and there also the agent of the plaintiff sold and delivered the greatest part of the cargo to Messrs. Adams and Hatton, merchants there. The captain then entered into a charter-party with Adams

and Hatton, to proceed from thence to St. Anne's and there to take in a cargo for London. After unloading the greatest part of the cargo at Montego Bay, and remaining there a month, it was verbally agreed that the remainder of the cargo, which was lumber, should be carried as ballast to St. Anne's; and accordingly the vessel, after taking in some sustick, proceeded towards St. Anne's, but was wrecked and never arrived there. For the plaintiff, it was urged, that in such an insurance the ship might go from port to port, and that at all events the goods were protected by the policy till they were all discharged and safely landed. Lord Kenyon was clearly of opinion, and was confirmed in that opinion by a special jury, whom his lordship particularly consulted, that the risk on the ship ceased after she had been moored at anchor twenty-four hours in the first port of the island for the purpose of unloading; and the facts disclosed in this case having manifested that Montego Bay was also the original destination of the cargo, and that its not being wholly delivered there was only prevented by a new agreement, the loss of the goods cannot be recovered under this policy of insurance. A ship insured to Jamaica generally, cannot be permitted to go round the whole island, from port to port, for the purpose of unloading her cargo, especially where, as in this case, the owner of the ship and goods is the same person. The plaintiff was nonsuited.

4. *LOCKYER V. OFFLEY*. E. T. 1786. K. B. 1 T. R. 252. S. P. *MERETONY V. DUNLOPE*. E. T. 1786. K. B. Id. 260.

Action on a policy of insurance on the ship *Hope*, from *Hamburg* to *London*, subscribed by the defendant for 200*l.* at one guinea per cent. At the trial of this case, a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case, and the plaintiffs were interested in the ship to the amount of the sum insured:—That in the course of the voyage, the master committed barratry by smuggling on his own account, by hovering and running brandy in casks under sixty gallons. That on the 1st of September, 1785, the ship arrived in safety at her moorings in the river *Thames*, and remained there in safety till the 27th of the said month of September, when she was seized by the revenue officers for the smuggling before stated. That about three weeks after the seizure, the plaintiffs informed the underwriters thereof, and that they would hold them liable on the policy. That on the 20th of October, the plaintiffs presented a petition to the commissioners of his Majesty's Customs, in which they imputed all the blame, which was certainly the truth, to the captain; and praying that their vessel might be restored on paying something to the seizing officer. The answer was that the prosecution must proceed, as the ship had been guilty of a gross violation of the law, but that the owners should be at liberty to compound according to the rules of the Exchequer. That the ship was appraised at the sum of 345*l.* and by the course of the Court of Exchequer, the ship would have been restored to the plaintiffs upon the payment of 230*l.* besides costs and charges, which would altogether have amounted to 327*l.* 9*s.* 7*d.* That in November, a notice was indorsed on the policy, binding the underwriters for all costs and charges expended about the recovery of the ship. That this was shown to the underwriters, who refused to subscribe it. This case was fully argued in the absence of Lord Mansfield, and the Court having taken time to deliberate, Mr. Justice Willes pronounced their unanimous opinion. There is no doubt in this case but that the master was guilty of barratry, by smuggling on his own account, without the privity of his owners. Many definitions of barratry are to be found in the books, but perhaps this general one may comprehend almost all the cases.—Barratry is every species of fraud or knavery in the master of the ship, by which the freighters or owners are injured; and in this light a criminal or wilful deviation is barratry, if it be without their consent. The general question here is, whether, as the loss which was occasioned by the barratry of the master did not happen during the continuance of the voyage, the insurers are liable? I must own this appears to me to be a novel question, and not to have been decided by any former determinations. Difficulties occur on both sides, in laying down any rule. The first thing to be observed is, that the policy,

- [187] by the terms of it, is an undertaking for a limited time, during the voyage from Hamburg to London, till the ship has moored twenty-four hours in safety; and the ship was not actually seized till near a month afterwards. But it has been said, under the 24th of Geo. 3. c. 47. and the excise laws, the forfeiture attaches the moment the act is done, and that the barratry was committed during the voyage. It may be so as to some purposes, as to prevent intermediate alterations or incumbrances; but I think the actual property is not altered till after the seizure, though it may be so before condemnation. I will put this case: Suppose before the seizure of the ship she had gone another voyage, and on her return had been seized; would the crown be entitled to an account of her earnings, after deducting the expenses of the outfit? Surely not. Till the seizure, it was not certain that the officers of the crown knew of the illicit trade carried on by the master, or whether they would take advantage of the forfeiture. It would be a dangerous doctrine to lay down that the insurer should in all cases be liable to remote consequential damages. This has been compared to a death wound received during the voyage, which subjected the ship to a subsequent loss. To this point, the case of *Meretony v. Dunlope* seems very material. That was an insurance on a ship for six months; and three days before the expiration of the time she received her death's wound, but by pumping was kept afloat till three days after the time. There the verdict, under the direction of Lord Mansfield, was given for the insurer, and it was afterwards confirmed by the Court. I will put another case: Suppose an insurance upon a man's life for a year, and some short time before the expiration of the term he receives a mortal wound, of which he dies after the year; the insurer would not be liable. The case of *Vallego v. Wheeler* was cited for the plaintiff; but that does not conclude this question, for there the ship was lost during the voyage; it was also argued, that this ship, even in the hands of a fair purchaser, would be liable to the forfeiture. I do not know that it ever had been so decided; it may depend on circumstances, such as length of possession, laches in seizing, or other matters. But suppose the law to be so; it does not follow from thence that though the ship is always liable to confiscation, the insurer at any distance of time is answerable for the loss under a limited undertaking. And this brings me to that part of the case which weighs most with the Court in favour of the defendant, and to which it does not appear to us that any satisfactory answer has been given. It was agreed in this argument, that the Custom-house officers might seize for the forfeiture within three years after the fact committed, and that the Attorney-General might file an information at any time whilst the ship was in being. Is the insurer during all this time to continue liable? Suppose the ship had gone several voyages afterwards, and suppose a partial loss paid, and the underwriters name struck off; shall an action be afterwards brought upon the policy? His accounts could never be settled, nor could he be finally discharged whilst the ship was in existence; such a position would be monstrous, and attended with infinite inconvenience. There must be some certain and reasonable limitation in point of time laid down by the Court, when the insurer shall be released from his engagement; if he be liable for a month, he may be for a year, and so on. We all think that the law of insurances would be left unsettled and in much confusion, if any other time were allowed than that prescribed by the policy, namely, the continuance of the voyage, and the ship's mooring twenty-four hours in safety. Judgment for the defendant.

5. *CAMDEN V. COWLEY*. E. T. 1670. K. B. 1 Bl. Rep. 417.

The insurer of a ship to Jamaica, by her mooring twenty-four hours in any port

Action on a policy of insurance on a ship at and from Jamaica to London; the ship was also insured from London to Jamaica generally, and was lost in coasting the island, after she had touched for some days at one port there, but before she had delivered all her outward bound cargo at the other ports of the island. In order to show when the homeward bound risk commenced, it was necessary to show at what time the outward bound risk determined; and to prove, that, by the custom of merchants, the outward bound risk determined, not when the ship arrived and moored twenty-four hours in any port intended,

but when she had been safe twenty-four [hours in her last port of delivery, there, does not conti
 Lord Mansfield, C. J., ruled, that insurance brokers and others might be [189]
 examined as to the general opinion and understanding of the persons concern-
 ed in the trade, though the Court knew no particular instance, in fact, upon
 which such opinion was founded. use till she
 arrives at
 her last
 port of deli
 vary.*

6. *PARKIN v. TUNNO*. E. T. 1809. K. B. 11 East, 22.

The insurance was on goods on board the ship *Laurel*, at and from Bristol to Monte Video, and any other port or ports in the river Plate, in possession of the English; and the plaintiff declared on a loss by perils of the sea. It was proved, that when the vessel appeared in the Plate, Monte Video, and every other port in that river, except Maldonado, was in the possession of the enemy, there being then war between Great Britain and Spain; and the English commander of Maldonado ordered the vessel away immediately upon her arrival, in consequence of the urgency of public affairs; whereupon the vessel, being short of water and in want of repairs, bore away directly for Rio Janeiro in the Brazils, being the nearest friendly port of safety; and in her course thither she met with a peril of the sea, to which the injury sustained by the goods might fairly be attributed in the absence of any direct evidence of a prior cause of damage. It was therefore insisted upon at the trial, and now again, in moving to set aside the nonsuit, that the ship not being able, under these circumstances, to proceed to any port in the river Plate, in the possession of an enemy, and being ordered away from Maldonado, immediately after her arrival there, by the authority of the British commander, whom the master was bound to obey, the policy continued to cover her to the nearest port of safety, to which she was under the necessity of repairing. But Lord Ellenborough at the trial, and now again with the concurrence of the Court, was of opinion that the policy, continuing a contract for a specific voyage, could not be extended by implication to cover the ship in her voyage to Rio Janeiro, notwithstanding the circumstances which had occurred to induce the necessity of it. The rule was refused. If a ship insured on arriving off her port of destination, is prevented from entering it, from its being in the hands of the enemy, or from being ordered away by the British commander there, the policy does not remain in force till she reaches a port of safety.

7. *BROWN v. VIGNE*. E. T. 1810. K. B. 12 East, 283.

A ship was insured from London to any port or ports in the river Plate, until her arrival at her last port of discharge in the river; and the master, intending to discharge her cargo at Buenos Ayres, passed Maldonado, but hearing that Buenos Ayres was in the hands of the enemy, he went to Monte Video, with intent to make a complete discharge there if the market were favourable; but after discharging part, and not finding the market there so favourable as he expected, he had not abandoned his original intention of going to Buenos Ayres, if it should afterwards be practicable; but while he was still discharging a part of his cargo at Monte Video, a loss happened by a peril of the sea. The question was, whether the voyage insured, under the above fact, were or were not determined at the time of the accident which occasioned the loss. For the plaintiffs it was contended, that as the master had not abandoned his original intention to proceed to Buenos Ayres, the voyage outwards was not ended, and the underwriters were still liable upon the policy, which was from port to port until the ship's arrival at the last port of discharge in the river Plate. When a ship insured to the ports of X., Y., or Z., or until her arrival at one, or her last port of discharge, passes X., intending to discharge at Y., but finding that the enemy [190] had possession of it, puts into Z., still retaining the intention of proceeding to Y. when friendly, Y. is her last port of discharge.

Lord Ellenborough, C. J. Does not the last port of discharge mean the last practicable port? The master could not have gone into Buenos Ayres, which was then an enemy's port; and was he at liberty to protract the voyage for that purpose till peace was restored? You would read the policy as if it were until her arrival at her wished-for port.

Bayley, J. Must not any port or ports be understood to be confined to friendly ports? While there is a possibility of the obstruction being removed

* When a ship arrived at a wharf where she intended to unload, and was laid on the outside of the tier, there being no room in the inside, and she made the usual preparations according to her situation to unload, and after the twenty-four hours she was found adrift and lost; held, that she was completely moored and in perfect safety previous to the accident; see *1 Park, 45.*

within a reasonable time, the risk of the underwriters continues. The case which comes nearest to the present is *Blackenham v. The London Assurance Company*, 1 Campb. N. P. Cas 454. 564. Here the ship being bound under convoy from London to Revel, on the 5th of November, learnt, in the course of her voyage, that an embargo was laid on all British ships in the ports of Russia; in consequence of which the convoy with the fleet put back, first into Copenhagen Roads, and then off Gottenburgh, waiting, as it seems, to see if the embargo would be taken off; and on the 30th of November the convoy and fleet sailed for England, and was last seen on the 3rd of December in a heavy gale of wind. Lord Ellenborough, C. J., nonsuited the plaintiff in the first action on the policy, considering the returning to England as an abandonment of the voyage. Then another action was brought in C. B., in which the jury, to whom the question of abandonment was left by the Lord Chief Justice of C. B., found a verdict for the plaintiff, which the Court afterwards set aside. But on the second trial, the jury having found the fact that the voyage was not abandoned, the Court of C. B. refused to set aside the verdict.

Per Cur. The policy is upon the ship until her last port of discharge in the river Plate. There are three known ports in the river Plate—Maldonado, Monte Video, and Buenos Ayres; and we may suppose the insurance to have been to these ports by name until her arrival at the last of them. Now the ship had passed by Maldonado, and had arrived at Monte Video, and she could not legally go to Buenos Ayres, which was then in the hands of an enemy. If then the voyage did not end at Monte Video, as the last port of discharge, as soon as it was ascertained that she could not proceed to Buenos Ayres, where was it to end? It would never end till a peace was restored, which would enable the ship to proceed to Buenos Ayres, if the master thought proper to wait for that event.

8. *HORNEYER v. LUSHINGTON*. H. T. 1812. K. B. 15 East, 46; S. C. 3 Campb. 85.

The goods insured were laden on board the ship in the port of London.—She sailed with a licence, and took on board simulated papers, representing that she came from Berghen, in Norway (Sweden being then at war with Russia). She arrived at Gottenburgh, from whence, after she had received orders, she proceeded to and arrived at Riga, where her papers were taken and her hatches immediately sealed down by the government officers, until her papers could be sent to St. Petersburg to be examined; and on such examination, orders were immediately sent to Riga to seize the ship and cargo, which was done, and she was afterwards condemned with her cargo, on the ground of having stimulated papers on board. This Lord Ellenborough held was not a mooring twenty-four hours in safety, there having been an incipient seizure on her arrival, which ended in her condemnation.

Per Cur. When this question was first agitated we had a difficulty in settling the construction which is now contended for, on words which we really believe bore a different construction in the commercial understanding of those who used them. However, the Court came to a decision on the point in the case of *Robertson v. French*; and this question now comes before us after the case of *Spitta v. Woodman*. It is, therefore, no longer to be doubted what construction is to be put upon those words. It is to be considered also, in aid of such construction, that the goods may have been damaged in their transit from London to Gottenburgh, which might cast upon the underwriter a damage occurring anterior to the commencement of the risk. It seems to us, therefore, that under the terms of this policy, the risk upon the goods never commenced; and there must be, therefore, a proportional return of the premium.

3. *WAPLES v. EAMES*. M. T. 1780. K. B. 2 Stra. 1243.

The ship *Success* was insured at and from Leghorn to the port of London, and was there moored twenty-four hours in good safety. She arrived on the 8th of July at Fresh wharf and moored, but was the same day served with an order to go back to the Hope, to perform a fourteen days' quarantine. The

If the ship do not arrive at the port till after an hostile embargo has been laid [191] on vessels of the nation to which she belongs, the underwriters are liable;

Or, when a ship with in twenty-four hours after her

men upon this deserted her; and on the 12th the captain applied to be excused arrival at going back, which petition was adjourned to the 28th when the Regency ordered her back; and on the 30th she went back and performed quarantine, being moored and then sent up for orders to air the goods, but before she returned the ship was burnt on the 23d of August. And now the question was, whether the insurer was liable? For the defendant it was insisted, that the ship arriving and being moored on the 8th of July, and remaining so till the 30th, here was a performance of what he had undertaken, and his risk ought not to be extended to so long a time as between the 8th of July and the burning on the 23rd of August. But it was ruled, that though the ship was so long at her moorings, and before yet she could not be said to be there in good safety, which must mean the opportunity of unloading and discharging; whereas here she was arrested within the twenty-four hours, and the hands having deserted, and the Regency taken time to consider the petition, there was no default in the master or owners. And it was proved, that till the fourteen days had expired there could be no application to air the goods; wherefore, the jury found for the plaintiff. The order was to go back the Hope to perform quarantine, and before she could return was burned, the underwriters were deemed responsible.

10. *MACKENZIE v. SHEDDON.* H. T. 1810. N. P. 2 Campb. 431.

Policy at and from Sheerness, in ballast, to Charente, and back to a port in the British Channel and London, from the date thereof, till the ship should be arrived at Charente, and touch at a port in the Channel and London, on freight valued at the sum insured, to be deemed interest in the outward voyage, although in ballast. The ship was freighted for the voyage in question by a charter-party, whereby she was to proceed to Charente in ballast, and there the freighter was to provide her with a full cargo of brandy. On the arrival of the ship at Charente, she was put under an embargo; and, after being so kept for six months, she was seized and condemned by the French government. It was for the assured contended, that the case came directly within *Thompson v. Taylor*, 6 T. R. 478; in which it was laid down that though the commencement of the risk of freight is generally from the taking of the goods on board, yet that where the ship is to sail to a distant place to take in her cargo, the risk commences on the freight from the time of her sailing to that place. Therefore, a ship having sailed from London to Teneriffe, to take in a cargo for the West Indies, and having been lost before she arrived at the port of loading, the insurers on freight were held liable. A policy was made on the freight of a chartered ship from last, to Charente, and back to the Channel; the sums insured to be deemed interest on the outward voyage, although in ballast. It was ruled that the policy could cover a loss which happened while the ship lay at C. during an embargo.*

Lord Ellenborough, C. J. Looking merely to the words at the bottom of the policy alluded to by the defendant's counsel, I should have thought it very doubtful whether the freight was meant to be insured from the arrival of the ship at Charente to the beginning to take goods on board. Although I have never hitherto met with a policy by which the responsibility of the underwriters was suspended, and the risk was divided into two discontinuous halves, such a policy may doubtless be framed; but when I consider all the words inserted in this policy, I am of opinion that it was meant to cover the subject matter insured without any intermission, during the whole of the adventure.—The insurance is stated to be at and from Sheerness to Charente and back to London, upon freight from the date thereof, to continue till the ship should be arrived at Charente, and back at a port in the Channel and London. There might be great risk of the vessel being prevented from loading, and being seized by the French government before any goods were put on board; but it seems impossible to say that this was a peril for which the underwriters did not render themselves responsible. The last clause in the policy must be referred to the former, and the great object of the whole will then appear to have been to preserve the integrity of the risk. From the moment the outward voyage commenced, till the ship's return with the brandy, the underwriters have undertaken to indemnify the shipowners for any thing that should prevent the ship from earning her freight on the voyage insured; I therefore think they are liable for a loss happening in the manner alleged and proved. See 5 M. & S. 6.

* A ship coming into port with her death wound, or not moored twenty-four hours in safety, because she does not sink until the expiration of that time, entitles the assured as for a total loss; see *Shaw v. Felton*, 2 East, 109. *abr. ante.*

A policy on freight attaches upon the loading of the cargo; and if a valued policy, the whole attaches upon the loading of any part of it.

And it attaches on the ship's sailing under that contract by which the freight is to be earned, though there be then no cargo on board.

[194]

Where freight is

(c) *On freight.**

1. MONTGOMERY v. EGGINGTON. T. T. 1789. K. B. 3 T. R. 362.

In an action upon a policy of insurance upon ship and freight, it appeared that the ship had been destroyed by a tempest before the goods, which were ready to be shipped, were actually on board.

Lee, C. J. was of opinion, that the plaintiff was not entitled to recover for freight, as the goods not having been actually on board, the plaintiff's right to freight had not commenced; but, where the right to freight has commenced, as if part of the goods are on board, and the rest ready to be shipped, the plaintiff will be entitled to recover on an insurance on freight.

2. THOMPSON v. TAYLOR. M. T. 1795. K. B. 6 T. R. 478. S. P. HORNCAS-
TLE v. SWART. E. T. 1806. K. B. 7 East, 400.

A ship was chartered for a voyage from London to Teneriffe, where she was to take wine on board, and carry it to the West Indies; and it was covenanted that the owner was to receive for the freight for the said voyage so much per pipe; and the vessel set sail, but was captured before she arrived at Teneriffe. This case was not so fully considered or so well understood at Nisi Prius as it is now; for it was there taken for granted, that every consideration respecting the ship's sailing from London to Teneriffe might be laid out of the question without prejudicing the plaintiff's right. If that were so in fact, this case could not have been distinguished from the case of *Tonge v. Watts*, where "as the goods were not actually on board, so as to make the plaintiff's right to freight commence;" the Court held, that the plaintiff could not recover on an insurance on the freight. But this case is clearly distinguishable from that, and rests on peculiar circumstances. The property, against the loss of which the assured wished to be indemnified, is that which he had a right to receive, under the charter-party; and it seems now admitted that if the contract had its inception, if any thing were done under it by the plaintiff, who led his ship to hire, his right to freight commenced. That depends on the words of the charter-party, which are "that the ship should, on or before the 9th of February, depart out of the river Thames, and directly proceed to Port Orotana, in Teneriffe; and after the ship should be ready to receive goods, lie 20 days, and load and receive on board her from Messrs. Cox 500 pipes of wine, and then sail and proceed to Barbadoes." Now it seems to us, that the argument on behalf of the plaintiff is well founded; that there was an inception of this contract by the owner of the ship; for the ship did sail from the Thames towards Teneriffe, and was captured in the course of that voyage. In the case in *Strange*, the inception of the contract would have been the taking of the goods on board; but as the loss happened before the goods were put on board, there was no inception of the contract, and the plaintiff was nonsuited. But in the case of *Montgomery v. Eggington*, there was an inception of the contract, because part of the goods had been put on board, and the party there recovered on an insurance on freight. So here, as the plaintiff had begun to perform his part of the contract, as he had done something under it which, if matured, would have entitled him to his freight, we are of opinion he may recover on this policy, which was an insurance on that freight. His contract under the charter-party was entire, and we cannot divide it. The ship was to sail from hence to Teneriffe, where she was to take wine on board, and carry it to the West Indies; he was to receive freight for the whole voyage, and the plaintiff had performed part of the contract. Therefore, on the principle on which the case in 2 Stra. 1251. was decided, though the circumstances of that case are different from those in the present, the plaintiff is entitled to recover.

3. EVERITH v. SMITH. H. T. 1814. K. B. 2 M. & S. 278.

Policy on freight, valued at and from R. and any ports in the Baltic to any

* The right to recover on a policy on freight has been said to depend upon this foundation, viz. that there must be a subject in existence at the time of the loss, out of which freight may arise or may be earned; 3 B. & P. 103. Per Chambers, J. Or, in other words, that the right to freight must have commenced or attached at the time when the loss is claimed to have happened.

ports in the United Kingdom; and the ship was chartered to sail with a cargo from L. to some port in the Baltic, not beyond R. and from thence to R. there to take in a homeward cargo, &c.; and sailed from L., and arrived at R., where she was detained for five weeks, and prevented from loading, by order of the government, and the freighter never loaded her; and a few days after the detention ceased the frost set in, which detained her there till the spring; when she procured a freight from other persons, and returned with it to L.; but the expense of her detention exceeded such freight. The Court held, that the policy had attached at the time of the detention; but that the freight having been afterwards earned, the underwriters were not liable.

4. *ROBERTSON V. MAJORIBANKS.* M. T. 1819. N. P. 2 Stark. 576.

The *Lady Castlereagh* had completed her outward-bound voyage to New South Wales; the captain had made a contract with the governor to proceed with convicts to Van Dieman's Land, and from thence to convey troops, women, and children, to Madras, and that the vessel had completed the voyage to Madras, and had thereby earned 2,500*l.* It also appeared that the plaintiff had effected policies to secure the fruits of the voyage to Madras, at the rate of 40*s.* per cent. and that the present defendant had been one of the insurers upon that policy. In expectation of freight to be procured from Madras to England, the present policy had been effected. The vessel had been driven from the Madras roads by a monsoon, and it was not disputed in the action that she had afterwards been lost through perils of the seas. Before this a charter-party had been executed for the conveyance of troops from Madras to England for the sum of 10,000*l.* It was contended on the part of the defendant that the plaintiff was not entitled to recover for a greater loss than 7,500*l.* since the sum of 2,500*l.* had actually been earned by the voyage from New South Wales to Madras. On the part of the plaintiff it was alleged, that the latter insurance, upon which the present action was brought, had been effected entirely with a view to the latter voyage from Madras to England, and that the special memorandum had been introduced solely with that view. That the sum of 40*s.* per cent. had been paid to the defendant for the insurance, to the amount of 2,500*l.* from New South Wales to Madras, and five guineas per cent. on the subsequent voyage; and therefore that the whole sum insured by the two policies was to be considered to be 12,500*l.*; and that otherwise the plaintiff would in fact have been paying at the rate of 7*l.* 5*s.* per cent. on the voyage from New South Wales to Madras; or at least that the plaintiff was entitled to a return of the premium on the first voyage. It was proposed to give evidence to show that the intention of the plaintiff to insure to the amount of 10,000*l.* on the latter voyage had been communicated to the underwriters, and that the memorandum had been introduced with their concurrence for the purpose of effectuating their object.

Abbott, Ld. C. J. Here is a policy which covers the freight from New South Wales to Madras; if the ship had been lost between the two the insurer would have been liable to the loss of the freight. It is of infinitely greater importance to abide by the terms of a written instrument, although the object of the parties may be frustrated in particular instances, than in every case to enter into a discussion of the motives and intentions of the contracting parties. I am of opinion that the policy would have been sufficient to cover a loss, if it had taken place between New South Wales and India, to the amount of 10,000*l.*; and since the defendant must have paid such a loss, he is entitled to have the sum of 2,500*l.* which has been received, deducted from the 10,000*l.* —Verdict accordingly.

5. *BARCLAY V. STERLING.* E. T. 1806. K. B. 5 M. & S. 6.

A policy on freight, at and from the ship's port of loading at J. to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading as aforesaid, with leave to discharge, exchange, and take on board, goods at any port she may call at, without being deemed a deviation, the ship having sailed with a cargo loaded at J., was, during the voyage, cast on shore at an intermediate port, and lost a part of her cargo.

discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading as afore said, with leave to discharge, exchange, and take on board goods at any port she may call at, without being deemed a deviation, covers the freight of [196] goods loaded at an intermediate port.

cargo, and took on board other goods at that port to complete her cargo, and arrived at her port of discharge and earned freight. The question was, whether the assured, who had abandoned to the underwriter upon intelligence of the loss, was liable to the underwriter for freight of the part of the cargo loaded at the intermediate port, after deducting the expenses attendant upon procuring the said freight.

Per Cur. The first objection is, that this policy would only have attached on the freight of such goods as were put on board at Jamaica, but not elsewhere. But such a construction is contrary to the true intent of the policy; for the policy contains no words limiting it to the goods to be put on board at Jamaica. The two *termini* were Jamaica, and the ship's port of discharge in the United Kingdom, with leave to call at any of the West India islands; and I think that any freight earned between these two *termini*, and within the limits of the leave specified, would have been covered by the policy. In a subsequent part of the policy there is leave given to discharge, exchange, and take on board goods at any place the ship may call at; this was not to be deemed a deviation. Then, if the assured were to have full power to do this, how comes it that the freight of the goods thus taken on board is not to be included in the policy? The underwriter's risk is not increased by the assured taking on board one half of the cargo at Jamaica, and the other half at Cuba, when he might have taken on board the whole at Jamaica; on the contrary, the risk is thereby diminished. For suppose in this case a loss to have happened before the ship was fully laden, the underwriter would have sustained a loss but upon half his ship. In principle and good sense, there can be no reason why this policy, which was intended to cover the freight upon the whole voyage, should not attach upon the freight of goods loaded at an intermediate port in the voyage. I therefore think that the Havannah freight was covered by the policy. It would be unjust to hold otherwise. The assured estimates the whole freight at 4,200*l.* If one half is washed overboard, and a fresh half is substituted, why should he be allowed to earn the freight of that half, and put it into his pocket? With respect to the abandonment, the import of it is, that the assured declares that he does not look to any benefit from the freight of the voyage, but is content that the underwriter shall have it, paying to the assured the full 100 per cent. And this action is not brought to recover back from the assured any part of that money which was paid him by the underwriter, but to recover that portion of the freight which the assured has received, after having been paid the full amount of his freight. As to whether any deductions ought to be made, I think that the charges incurred while the ship was detained merely for the purpose of getting repairs, to enable her to complete her voyage, ought to be set to the account of loss on ship, for which the underwriter on ship will be liable. But as to any charges incurred while the ship waited at Cuba to obtain freight, we think they ought to be deducted.*

6. PHILLIPS v. CHAMPION. H. T. 1815. C. P. 1 Marsh, 402; S. C. 6 Taunt. 3.

An insurance on the freight of a ship destined for a fishing adventure in the South Seas, is not determined by the arrival of part of the cargo in another ship.

The ship was proved to have been lost in the South Seas. It appeared, however, before the loss happened, upwards of 800 seal skins in a damaged state were consigned from the ship, by means of another vessel, and actually arrived in this country. The jury found a verdict for the plaintiff. It was now moved that that verdict should be set aside, and a new trial granted. The general merits of the case, it was said, were out of the question; but the ground on which the motion was made was, that the policy, not being for any

* If freight be insured generally, and the insurance be not of a specific freight, though the adventure be protracted by one of the perils insured against, yet if the ship ultimately bring home a cargo from the port in question, there is no loss of freight; see *Everith v. Smith*, 2 M. & S. 278. The owner of a vessel entered into a contract with the East India Company, at Madras, for freight and the passage of invalids; and the ship having been surveyed by the Company's officers, and represented to be fit for the purpose, after certain alterations had been made, and goods had been shipped, water taken in for the invalids, and the projected alterations commenced, when loss by perils of the sea happened; held, in an action on a policy on freight and passage-money, this was an inception of the risk, and the plaintiffs entitled to recover; see 5 Moore, 33; S. C. 2 B. & B. 320.

fixed duration of time had terminated when the skins arrived in this country; contending that when any part of the cargo, which is the produce of the voyage insured, is sent home, that is the termination of the risk.

Gibbs, Ld. C. J. This is a mere fancy of the imagination. If a single seal had been caught, on the ships arrival in the South Seas, and had been sent home by another ship, the underwriter might as well contend that that would have been a termination of the voyage. In the present case, however, the skins were sent home on account of their damaged state; so that, though I am of opinion that on general grounds this defence would fail, the defendants are not entitled to avail themselves of it.

Per Cur. Rule refused.

7. *FORBES V. ASPINAL.* H. T. 1811. K. B. 13 East, 323. S. P. *FORBES V. COWIE.* M. T. 1808. K. B. 1 Campb. 520. S. P. *PATRICK V. EAMES.* T. T. 1813. N. P. 3 Id. 441. S. P. *KNOX V. WOOD.* M. T. 1808. N. P. 1 Id. 543.

A motion for a new trial in an action upon a policy of insurance at and from any port or ports in Hayti to Liverpool, &c. on freight valued at 6,500*l.* The ship had sailed from Liverpool to Hayti with a cargo, intended for barter; having bartered away part of her outward cargo, and taken in fifty-five bales of cotton in part of her return cargo, and was proceeding from one port in Hayti to another, viz. from Jaquemet to Du Cayas, to barter away the residue of her outward cargo and to complete her lading home, when she met upon an accident by the perils of the seas, which occasioned her total loss.

Per Cur. If the plaintiffs be only entitled to a satisfaction for a partial loss, that satisfaction has already been made, and a nonsuit should be entered. But the plaintiffs contend, that as this was a valued policy, and as part of the goods to be carried upon the freight insured were on board at the time of the loss, they are entitled to claim their verdict for a total loss. Freight is the profit earned by the shipowner in the carriage of goods on board his ship; and an insurance upon freight is an insurance made in order to secure that profit of the shipowner in case he is prevented by any of the perils insured against, from actually earning such profit. An insurance upon freight has no reference to the hull of the ship or to its outfit for the voyage, both of which are protected by insurance upon the ship, but its sole object is to protect the assured from being deprived by any of the perils insured against of the profit he would otherwise earn by the carriage of goods. To recover, therefore, in any case upon a policy on freight, it is incumbent on the assured to prove that less some of the perils insured against had intervened to prevent it, some freight would have been earned; and where the policy is open, the actual amount of the freight which would have been so earned limits the extent of the underwriter's liability. In every action upon such a policy, evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight; and in either case, if the policy be open, the sum payable to the shipowner for freight, together with the premium of insurance and commission thereupon, is the extent to which the underwriters are chargeable. In this case, therefore, as there was no contract under which the ship could claim freight but for goods actually shipped on the homeward voyage, the assured could have made no claim, had this been an open policy, but to the extent of the actual freight on the 55 bales of cotton which were shipped for this country, and of the premiums and commission thereon. The question then is, whether it makes any essential difference that this is the case of a valued policy? and we are of opinion, upon full consideration, that it does not.

* Where a chartered ship, after having arrived at the port at which she was to have been invested with her homeward cargo, took on board part of the cargo, but was lost in a storm before the expiration of the time within which her loading was to be completed, the ship owners were held entitled to recover for a total loss on a valued policy on freight, the part of the cargo which was not on board having been on shore and ready to be shipped at the time of the loss; see *Danahoe v. Hillyasey*, 1 M. & S. 313.

The object of valuation in a policy is to fix, by agreement between the parties, an estimate upon the subject insured, and to supersede the necessity of proving the actual value, by specifying a certain sum as the amount of that value. In fixing that sum, if the assured keep fairly within the principle of insurance, which is merely to obtain an indemnity, he will never go beyond the first cost in the case of the goods, adding thereto the premium and commission, and, if he think fit, the probable profit; and in the case of freight, he will not go beyond the amount of what the ship would earn, with the premium and commission thereupon. The valuation, however, in the case of goods, looks to all the goods intended to be loaded; and in the case of freight, it looks to freight upon all the goods the ship is intended to carry upon the voyage insured; and if by the perils insured against in a valued policy on goods, part only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of that part; and so, if by the perils insured against, the freight of part only of the goods to be carried be lost, the assured can only recover in respect of that loss, according to the proportion which that part bears in the valuation. The proportion is monstrous; instead of confining the policy, as it ought to be confined, to a contract as nearly as may be of indemnity, against what he lost in respect to freight by the perils insured against, it converts it into a contract of indemnity against a different class of accidents, which may operate to prevent the assured from being able to procure a full cargo upon freight, and make it the interest of the insured, which it never ought to be, that a loss should happen. The Court, therefore, will look for very strong authorities before they yield to such a proposition. It was pressed, upon the argument, that in the case of a valued policy, if any interest be proved to be on board, and there be no fraud, a total loss will entitle the assured to recover the sum specified in the valuation. And to that position we accede, with this limitation, that is, provided there is a total loss, by any of the perils insured against, of the whole subject matter of insurance to which the valuation applied, viz. of all the intended cargo of goods where the insurance was upon goods, and of all the intended freight where the insurance was upon freight. But if it be meant to carry that position to this extent that the underwriter is not at liberty to inquire what was intended to have been included in the valuation, or when he has ascertained that point, that he cannot reduce the sum below the valuation, by proving that a part only of what was included in the valuation has been lost by a peril insured against—we deny the position when so extended. In *Shaw v. Felton*, 2 East, 109. which has been strongly relied upon, the interest of the assured was in ship and outfit, including provisions and sea-stores laid in for slaves, and wages advanced to the crew; and the chief ground insisted upon for opening the policy was this, that the principal part of the provisions had been consumed in the voyage, and therefore had not been lost by the perils insured against. But that ground was resisted with effect; because the subject insured was to be considered as of the value ascribed to it when the voyage commenced; and if the diminution of the provisions were to be allowed to reduce the extent of the underwriters' liability upon the policy, every valued policy upon the ship would be to be opened; because every day after the voyage commenced the quantum of the ship's provisions would be proportionably reduced.

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A policy may be made on freight for a portion of a voyage; so for a specified duration of time.

8. TAYLOR v. WILSON. E. T. 1812. K. B. 15 East, 324.

The defendant subscribed the policy, and received the premium of eight guineas. The plaintiffs were owners of the ship *John*, and on the 25th of September, 1808, the plaintiff Taylor, who was the master of the vessel, and who is so stated to be in the policy, on behalf of himself and the other charterers, chartered the vessel; and by the charter-party she was to proceed from Newcastle to Lisbon with coals, and from thence to St. Ubes, in Portugal, and there take in a cargo of salt for Gottenburgh, in Sweden. The plaintiff Taylor, as master, went with the vessel to Lisbon, and there delivered the coals, and arrived at St. Ubes, in December, 1808, and there loaded 366 tons of salt, to be carried to Gottenburgh. The freight for each keel of coals to be delivered at Lisbon was 50*l.*, and for each ton of salt 5*l.*; and the plaintiff Taylor, as

master, signed bills of lading for the salt, which was to be carried to Gottenburgh. The bill of lading was for Gottenburgh. Portsmouth is one of the places from whence convoys were appointed to go to Gottenburgh and other ports in Sweden; and it was the intention of Taylor, the master, to proceed from St. Ubes with the vessel to Portsmouth, on her way to Gottenburgh. No communication was made to the underwriters that the vessel was to go to Gottenburgh. On the 25th of January, 1809, the vessel, with the salt on board, sailed from St. Ubes for Gottenburgh, and on the 4th of February, and before her arrival at Gottenburgh or Portsmouth, she was lost by the perils of the sea. If the plaintiffs were entitled to recover, the verdict was to be entered for 100*l.*, otherwise the nonsuit was to remain.

Per Cur. The only question is, whether a freight voyage may be insured part of the way. This was a voyage to Gottenburgh by way of Portsmouth, and the freight was to be earned at Gottenburgh. There might be a greater peril in the first part of the voyage than in the other, which might have induced the plaintiffs to insure the first part. They did not deceive the underwriter when they insured their freight from St. Ubes to Portsmouth; they did not tell him that the freight was to be earned there, but only that it was an insurance on freight in that voyage. There is no doubt that a party may insure his ship and goods during part of a voyage; and we cannot conceive why he may not also insure freight in the same manner. There is no case which intimates the contrary, except that of *Murdock v. Potts*, at *Nisi Prius*, which was never brought before the Court, and is inconsistent with all the other cases. Except that opinion, there is nothing to distinguish an insurance on freight, in this respect, from an insurance on ships or goods for a part of the voyage. There is no foundation for saying that a voyage is not divisible as a subject of insurance.

(L) RELATIVE TO WHAT IS A DEVIATION FROM THE VOYAGE DESCRIBED IN THE POLICY, AND ITS EFFECT.

(a) *What constitutes a deviation.*

1. *GREEN v. YOUNG*. M. T. 1695. K. B. 2 Lord Raym. 1201; S. C. 2 Salk. 444.

In this case the Court held, that if a policy of assurance be made to begin from the departure of the ship from England, until, &c., and after the departure damage happens, and then the ship deviates, though the policy is discharged from the time of the deviation, yet for the damages sustained before the deviation, the insurers shall make satisfaction to the insured.

2. *ANON*. H. T. 1720. K. B. Lofft. 421.

Action upon a policy of insurance from Grenada to London, with the usual covenants, and that the ship should sail to and from Grenada. The ship sailed; and on his return the captain stopped at Antigua, meaning, as it appeared on the state of evidence, to go home, and not to continue captain the whole voyage. The ship laid at anchor off Antigua thirty-six hours. The ship on return was lost. The question was, whether this was a deviation? On one side, Lord Mansfield observed, it was contended that every innocent delay was a deviation; the other, that a deviation must be a crime. His lordship repeated his directions to the jury. I told them the insured was obliged to find a captain or person to take the conduct of the vessel; that it appeared this delay was owing to the staying for a mate. At that time, in my own mind, I was inclined to think it a deviation; but I left it to the jury, they found it no deviation. The counsel, for the new trial, said, that the evidence went sufficiently in proof of a deviation; that whether, by going fifty or an hundred leagues out of the way, or by loitering in the harbour, it would be all alike. That the ground was altered from what had been taken upon the trial; for then it had been attempted to justify the deviation, but now to prove that there was none. As to necessity, which was the ground on which the captain himself had rested, he might have got a mate at Grenada; that it was no excuse that the men in the vessel were not capable, for proper men ought to have been provided when they set out from the port of departure. He concluded with ob-

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Deviation is a departure out of the prescribed course of the voyage, and will, unless there be some excuse for the deviation, invalidate the policy from the time it was committed.

What shall or shall not be a deviation depends on the peculiar circumstances of the case.

serving, that he thought the jury were men not much acquainted with questions of that sort; to which Mr. Wallace answered, that one of them was a captain of a ship himself. Lord Mansfield. The inclination of my mind is much the same as on summing up; but I doubt, on such a case, when the jury had found the verdict, whether there should be a new trial. They set sail from Grenada; no necessity for delay. If the master had been sick, or one of the men died, they might have delayed twice as long, without any ground of complaint from the delay. Here has been no fraud, no intention of carrying on trade for themselves; this does not indeed alter the point of law, but may alter the reasons for granting a new trial after verdict. Mr. Justice Aston seemed to think, it was not much material when they changed the master of their voyage, or when they set out; and it might be more expeditious at Antigua; and, as to illness, he says he is well at present, but by the subsequent letter, he says he has been ill. Mr. Justice Willes. If there had been no finding, I should have been at a loss how to direct; they certainly were bound to set out with proper men. It may be dangerous, however, to construe thirty-six hours delay fatal: for it would be very hard for commerce that such a delay, for which there was a good reason for the security of the ship, should be held of such prejudice to the captain; though, perhaps, he would have done better if he had avoided the delay, by providing all things necessary before he set out. There would be no drawing the line; a delay of five hours might be construed a deviation.

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An intention to deviate is immaterial, provided the voyage on which the ship sails is that insured.

3. KEWLEY v. RYAN. T. T. 1794. C. P. 2 H. Bl. 343.

A policy of insurance on certain goods on board a certain ship, on a voyage at and from A. to B.; and another policy is also made on any kind of goods, as interest should appear, on board ship or ships on the same voyage, warranted to sail within a limited time; but no circumstances relating to the first policy are communicated to the underwriters of the second, nor do they know that the first was made. Goods to the full amount of the sum insured in the first policy are put on board the specified ship, which arrives in safety; goods also to the full amount of the sum insured in the second policy are put on board another ship, which sails within the time limited from A., with an intention to touch at C. in their course to B., but is lost before she arrives at the deviating point. The Court consisting of the Lord Chief Justice, Mr. J. Heath, and Mr. J. Rooke, declared their opinion, as to the first point which had been made in the argument, that the legality of the policy on ship or ships was too well established, both by usage and authority, to be disputed; *Hemchman v. Offley* was an authority. As to the third, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate not effected, would not vitiate the policy. That in *Woolridge v. Boydel*, it appeared there was no intention that the ship should go to Cadiz at all, which was mentioned in the policy as her port of delivery; and in *Way v. Modigliani*, there was an actual deviation, by the ship going to fish on the banks of Newfoundland: those cases, therefore, were wholly different from the present; for here the ship was really bound to Liverpool, though there were also clearances for Cork.

4. THELLUSON v. FERGUSON. E. T. 1780. K. B. Doug. 361.

A deviation intended, if the loss happen before it take effect, does not discharge the policy.

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A French ship was insured at and from Guadaloupe to Havre, warranted to sail on or before a particular day. The ship took in her complete lading and all her clearances at Point-a-Pitre, and sailed thence before the day for Basseterre, a condition having been inserted in one of the clearances, that the ship should pass that way to take the orders of government, and the captain also expecting, in consequence of a notice which had been given by the governor, that there would be a convoy at that place. It appeared that the captain had paid an extra fee in order to procure his clearances, that he might take the benefit of the convoy. The ship arrived at Basseterre two months before the day on which she was warranted to sail, and was detained there by the governor until after the day. It was proved that Basseterre was in the direct

course of the voyage. Under these circumstances it was held, that there had been a *bona fide* and complete inception of the voyage on the day the ship sailed from Point-a-Pitre, and consequently that the warranty had been complied with.

5. *REDMON v. LOUDON*. E. T. 1814. C. P. 1 Marsh, 136; S. C. 5 Taunt. 462; S. C. 3 Campb. 503.

In a policy of insurance at and from London to Berbice, after the clause beginning the adventure, &c., are inserted the words "at sea;" and at the bottom of the policy, the words "on ship." The ship, without express leave so to do, stops at Madeira, by which means she loses her convoy, and is captured on her way from thence to Berbice. It was admitted that this was a deviation from the regular course of the voyage, but contended, as before, that the words which had been inserted so controlled the general effect of the policy, as to make the risk commence at sea.

Gibbs, Ld. C. J. At what point of the voyage do you suppose the risk to have commenced? The Court has every disposition to assist you, because the underwriters had seen the letter. It was then contended that, even supposing the policy to have attached at London, and not at sea, yet the underwriters having signed the policy, after the premiums had been communicated to them, had consented to that deviation, and had waived their right to set it up as a defence.

Gibbs, Ld. C. J. You should have shaped your contract accordingly. The contract in its present form is to indemnify the plaintiff in a voyage from London to Berbice, and that voyage should have been performed as the law requires. In the school of morality your argument would be irresistible; but we are not here on the honesty of the case. I fear you cannot support your motion.

6. *MURDOCK v. POTTS*. T. T. 1795. K. B. 2 Park Ins. 399.

Case upon a policy of insurance on freight of the ship *Bethiah*, at and from Bourdeaux to Virginia, warranted American ship and property; and declaration alleged, that the ship was an American ship, and the property of American subjects. The plaintiff proved the ship to be American; and it was to have been contended upon the part of the defendant, that the warranty extended to the goods on board as well as to the ship; but upon the evidence it appeared that the goods, whether American or not, were to be carried in the ship from Bourdeaux to St. Domingo, and that she was only to call at Norfolk, in Virginia, for orders. This rendered it unnecessary to discuss or decide the question upon the construction of the warranty, Lord Kenyon being of opinion that the underwriters upon this policy had a right to expect that the goods, upon which the freight was payable, were consigned to Virginia, and that the freight was payable for the carriage of them from Bourdeaux to St. Domingo; the underwriters were not liable for the loss, though the ship was to call at Norfolk for orders, the freight payable being in such case different from the freight insured. Plaintiff was nonsuited; and no application was made to set the nonsuit aside.

7. *HARTLEY v. BUGGIN*. M. T. 1782. K. B. 2 Park, Ins. 415. S. C. 1 Marsh Ins. 194. *S. P. PARKINSON v. COLLIES*. M. T. 1797. K. B. 2 Park, Ins. 416.

In an action by the assured against an underwriter on a policy of insurance on the ship *Blossom*, at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves, a verdict was given for the plaintiff; but upon a rule being obtained to show cause why there should not be a new trial, it appeared that there had been a great deal of contradictory evidence, and many points started at the trial; but the question now made was, whether the plaintiff, by the use he made of the vessel on the coast of Africa, and the delay he there occasioned, was not the cause of the loss? that is, whether he did not make such use of her during her stay on the coast, contrary to the design of the policy, as amounted to a deviation? It appeared in evidence that this ship stayed on the coast from August to March; that she was employed

A deviation from the voyage specified is fatal, although the policy is not effected till after it has taken place, and the underwriters have notice of the circumstances.

A voluntary deviation vitiates a policy of insurance on freight as well as one upon ship and goods.

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otherwise
their con-
duct will
amount to
a deviation,
and dis-
charge the
policy.

in receiving slaves on board, the produce of the cargoes of other ships, which were afterwards put on board other ships, and sent to the West Indies; that this is the employment of what they call a factory ship, but that a regular factory ship is thatched and covered, and receives the slaves till a sufficient number is collected to send away in the vessels; but it did not appear that any slaves, the produce of the Blossom's own cargo, were sent away in other vessels, but that her stay there was several months beyond the usual stay of ships in that trade. After argument at the bar, Lord Mansfield said: When different points are agitated at a trial, and a great deal of evidence applied to each, and the counsel go out of the cause, it is not to be wondered at if juries should turn their attention to the material point. The great advantage of a motion for a new trial is, that after argument on the motion, the cause goes down again, winnowed from the chaff of the first trial. The single point here is, whether there has not been what is equivalent to a deviation, whether the risk has not been varied? It is not material whether or not the risk is greater. If a ship insured for a trade is turned into a floating warehouse or a factory ship, the risk is different; it varies the stay; for while she is used as a warehouse, no cargo is bought for her. The law being clear, how is the fact? The captain says she was not used as a factory ship; his evidence is much impeached, but he says he was young in the trade; he never saw a factory ship but once, and was not in her; he might have a salvo, because this was not thatched; but was she used as a thatched ship is used? It is said that letters are not records, it is true they may be contradicted; but if they are from the parties, and are not contradicted, they are as strong as any records. The fact is clear; the risk is different in point of length, &c.—Rule absolute for new trial.

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Calling at
Dover for a
Mediterranean
pass in an insured
voyage from Dun-
kirk to
Leghorn,
was held
to be a
deviation.

8. *TOWNSON v. GUYON*. M. T. 1797. K. B. 2 Park, Ins. 388.

Action was brought upon a policy on goods and other merchandizes loaded on board the ship called the *Charming Nancy*, from Dunkirk to Leghorn. The ship came to Dover in her way to procure a Mediterranean pass, and was afterwards lost. Lord Mansfield was of opinion that the calling at Dover was a deviation, and the plaintiff was nonsuited.

9. *PHILP v. AULDJO*. M. T. 1810. N. P. 2 Campb. 350.

It is a de-
viation if
the master
leaves a
port for a
particular
purpose by
the com-
mand of a
captain of a
King's ship
lying there,
without
any remon-
strance.*

Action on a policy of insurance. The only question was, whether the master had not been guilty of a deviation? It appeared that while he lay at Iceland, and when he had taken in almost the whole of the cargo, the captain of an English ship of war lying near him, the topmost and yards of which were then struck, ordered him to go out to sea, to examine a strange sail which was discovered in the offing, bearing enemy's colours; that the master did not remonstrate against this order, but unmoored, and put out to sea; that although 40 of the crew of the ship of war had been on board the *Margaret* and *Anne* in the morning of the same day, they had all been withdrawn before he began to unmoor, and that no violence or threats were used to induce them to do so; that he fired two guns at the strange sail, and brought her to, when she appeared to be a neutral; and that he then returned to his moorings. Being examined as a witness, he said he considered himself bound to obey the orders of the captain of the ship of war, but he did not make any protest upon the occasion.

Lord Ellenborough. I am of opinion that this is an unexcused deviation. Where is the *vis major*? The master is not proved to have acted under any duress or compulsion. If a degree of force was exercised towards him, which physically he could not resist, a deviation is justified. But if he chose to go out in the hope of making a prize, he could not thereby extend the risk of the underwriters. Suppose the ship had been captured when she went out upon this cruise. Were the underwriters to bear the loss? The purpose might be laudable, and a compensation to the owners would probably have been made by government; but when the ship engaged in this hostile adventure, the voyage insured was at an end.

* It is equivalent to a deviation if a ship insured on a trading voyage on the coast of Africa, stays there beyond the usual time as a receiving ship; see *Hartley v. Buggin*, 1 Marsh, Ins. 191.

10. *FOX v. BLACK*. H. T. 1797. K. B. 2 Park, Ins. 387.

The plaintiff was a shipper of goods in a vessel bound from Dartmouth to Liverpool; the ship sailed from Dartmouth, and put into Loo, a place she must of necessity pass by in the course of the insured voyage. But as she had no liberty given her by the policy to go into Loo, and although no accident befel her in going into or coming out of Loo, for she was lost after she got out to sea again, yet Mr. Justice Yates held, that this was a deviation; and a verdict was accordingly found for the underwriter.

A vessel sailing from Dartmouth to Liverpool put into Loo, a place she must of necessity have passed; held to be a deviation. A ship may trade in the course of her voyage, provided it can be done without deviation or delay, or otherwise increasing the risk of the insurers.

11. *RAINE v. BELL*. H. T. 1808. K. B. 9 East, 195.

Insurance at and from the ships loading in ports on the coast of Spain to London, with liberty to touch and stay at any port or place whatsoever. The jury found expressly that the going into and staying at Gibraltar, was a deviation of necessity, in order to procure a supply of provisions, and that the stay was not longer than the necessity required; and it was proved, that while the vessel lay there, the captain received on board some chests of dollars. This fact, and this finding of the jury, raised the question of the law, whether the taking in the additional cargo of dollars was a breaking of bulk in the course of the voyage, at a place where there was no liberty to trade given by the policy, so as to avoid it, as increasing or having a tendency to increase the risk? This point was very fully argued; and the council who argued that this amounted to a deviation relied on the two cases last quoted. But the Court were unanimous in deciding, and they delivered their opinions *seriatim*, that as the jury had found that the whole period of the ship's stay was covered by the necessity which originally induced her to go into Gibraltar, there was no implied warranty in such a policy that the ship shall not trade, so as no delay be actually occasioned; and as to the temptation to deviate held out to the master, that must always be a question for the jury, as in all other cases of fraud, whether the deviation or delay arose from the trading or from necessity; and an intention to deviate not carried into effect will not avoid a policy; still less can a temptation to deviate avoid it.

ed; held to be a deviation. A ship may trade in the course of her voyage, provided it can be done without deviation or delay, or otherwise increasing the risk of the insurers.

12. *BEATSON v. HOWORTH*. H. T. 1796. K. B. 6 T. R. 531. S. P. CLASON v. SIMMONS. H. T. 1741. K. B. 6 T. R. 533.

Case upon a policy of insurance on a ship at and from Fisherow to Gottenburgh, and back to Leith and Cockenzie. It appeared that in the homeward voyage she went first to Cockenzie, which lay nearer to Gottenburgh than Leith, and was stranded in the harbour of Cockenzie. There was a good deal of evidence given to show that Leith harbour was the safest of the two, but the jury seemed to be of opinion, according to a note taken by Lord Kenyon at the time, that the construction of the policy was to be made by attending to the order in which the places were named in it. The jury, however, by consent of parties, to save the expense of going to trial again, found a verdict for the plaintiff, with permission to enter a verdict for the defendant, if the Court should agree that the above construction was the true one. The case came on to be discussed in court; and they were of opinion, that unless there be some usage proved, or some special facts, to vary the general rule, the party insured must go to the several places mentioned in the policy in the order in which they are named, and that to depart from that course is a deviation; and one of the judges added, that the parties by inserting the names contrary to the natural order of the places showed it to be the intention of the parties to vary the natural course of the voyage. A verdict was entered for the defendant.

If the voyage described in a policy be from A. to B. and C., and the ship go to C. before B., (though C. be nearer to A. than B. is), it is a deviation, and the plaintiff cannot recover for subsequent loss, if it be not the regular and settled course of the voyage to go to C. first.

13. *HOMOR v. THE ROYAL EXCHANGE ASSURANCE COMPANY*. M. T. 1814.

Ex. 1 Price, 195.

The vessel sailed on the 13th of September, at eight o'clock, a. m. with the wind about northwest. When she had got between Helford and Coverack Cove, the wind began to blow strong from the westward, and the Manacles lay before them. On heaving the vessel in stays, she shot ahead farther than was expected, and touched ground on the sands, but got off without injury. They then hailed a fishing-boat, in which the captain sent a man ashore to

When a captain on a voyage, delayed by adverse winds and danger, puts into a place of

safety in his course, and sends a shore for provisions (although he transmits a letter at the same time), it is not a deviation, and it is a question to which the jury are competent.

Coverack for a barrel of fish, and to make inquiry as to any one having been from Holstone, who returned with the fish in about half-an-hour. The next day, the vessel not having made, or being able to make, any progress, the wind being a-head, and a flood-tide, and there being privateers cruising off the coast, they put into Guanas Lake, Mount's Bay, where they lay to at single anchor for the night; from thence, Hervey, the supercargo, wrote a letter to the plaintiff, which he sent ashore at Penzance by one of the crew; the next day the same man went ashore again for an answer from the plaintiff. He saw the plaintiff at Penzance, and they came and hailed the supercargo and captain to come on shore, which they did, and they all transacted business together. They afterwards went on board, and weighed anchor, and put to sea about six o'clock, p. m., and in about an hour afterwards the vessel was discovered to be on fire. She was ultimately consumed, and the cargo totally lost. The principal point of the defence set up was a deviation; and, to support that defence, their witnesses said the wind was fair on their leaving Holstone, and that though there was afterwards a head wind, by beating to windward they might have proceeded to Cork.

Per Cur. We agree that there should be a reasonable cause to justify a deviation; but going in for provisions is a justifiable cause; and the jury were to decide whether it was a *bona fide* going in for that purpose. Perhaps the master of a different vessel might have got quicker round. We take it for granted that Mount Bay is in the course of the voyage, and, if so, sending a letter would be no deviation. We think there has been no misdirection, and that the verdict is not contrary to the weight of the evidence.

14. LAMBERT v. LEDARD. E. T. 1814. C. P. 1 Marsh. 159; S. C. 5 Taunt. 480.

On a policy at and from Pernambuco, or any other port or ports in the Brazils to

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London, "beginning the adventure from the loading the goods on board the ship, on the termination of her cruise, and preparing for her voyage to London." The ship, on the termination of her cruise, touched at at Pernambuco; but failing to procure a cargo there she proceeded to Salvador, and was lost on her voyage thither.

On a policy at and from Pernambuco, or any other port or ports in the Brazils, to London, "beginning the adventure from the loading the goods on board the ship, on the termination of her cruise, and preparing for her voyage to London." The ship, on the termination of her cruise, touched at Pernambuco; but failing to procure a cargo there she proceeded to Salvador, and was lost on her voyage thither. In argument it was premised that there were three special qualities in the policy; 1st. That it should commence at the termination of the cruise; 2ndly. That the ship might carry letters of marque; and 3rdly. That she had leave to take in goods at any port or ports in the Brazils. As to the first objection, they contend that the ship having been insured at and from Pernambuco, or any other port or ports in the Brazils, the meaning of the policy was that she should be at liberty to go to any, and any number of ports on that coast, till she had completed her cargo; and, that at the first port at which she should touch, whatever that might be, the policy should attach; and the attaching of the policy could not be affected by any subsequent deviation. The cruise had ended at Pernambuco, and the ship having become a trading ship the policy attached there. As to the second objection, that the going to St. Salvador was a deviation, they contended that, by the words of the policy, the ship had a right to go to any number of ports in the Brazils, and in any order, though not in her direct course to London, provided she kept the purpose of her voyage in view, viz. the procuring a cargo to bring to London. They said this was the same case as if the policy had been from Pernambuco to London, with liberty to go to St. Salvador. In order to support the defendant's proposition, that, having made her election of her port of loading, the ship could not afterwards go to any other port, unless in direct course to London, the words should have been "at and from Pernambuco, and no other port," instead of "at and from Pernambuco, and any other port or ports." As long, therefore, as the ship remained on the coast of Brazil, she was under no limitation as to the ports she went to. This case was compared to that of Bragg v. Anderson, 4 Taunt. 339. where the Court held, that a policy at and from Martinique, and all or any of the West India islands, to London, warranted the ship in touching at St. Domingo, though that island was considerably out of her direct course from Martinique

to London. As to the last objection, that the voyage was not described in the declaration so as to meet the evidence, they said this was in fact a question on the merits, and depended on the second point, which had been reserved; for if the ship had a right to go to St. Salvador for the purpose of getting a cargo for London, the voyage was well stated as from Pernambuco to London. At all events, the second count was correct, in averring that the ship was proceeding towards London.

Held, that the ship's proceeding to Salvador was no deviation.

Per Cur. We are against all risks till her cargo was completed. We are of opinion that the words of the policy are sufficient to cover those risks. The ship arrived off Pernambuco, and an officer was sent on shore for the purpose of procuring a cargo; failing in her attempt there, she was proceeding to St. Salvador with the same view, and was lost in that voyage. The defendant then objects that, either the policy was not to attach till the ship's arrival at the port of actual loading, and then to be sure it did not attach at all in this case; or else that, having elected Pernambuco as her loading port, she was afterwards guilty of a deviation; and that, even though there might be nothing illegal in that deviation, yet that this was not the voyage insured. We think the words of the policy answer both these objections. If the policy had been at and from Pernambuco or any other port in the Brazils, there might have been some colour for the defendant's argument; but the alternative being any other port or ports, there must have been a contemplation of her going to more ports than one. The object of the policy must have been to secure the insured from all risk from the time the cruise ended, while she was receiving her cargo, and till her arrival at London. In the case of *Hogg v. Horner*, the words were not so comprehensive as in the present. It has been objected that, though the cruise was ended, the ship was not preparing for her voyage. We think that having come to Pernambuco to procure a cargo, and having sent an officer on shore for that purpose, she must be considered as preparing for her voyage within the words of the policy, and that, therefore, the policy had attached; we also think that she had a right to go to St. Salvador for the purpose of procuring a cargo. As to the objection that the voyage was not correctly stated in the declaration; supposing our construction of the policy to be a just one, the voyage might fairly be described as from Pernambuco to London. [208]

15. *BOND v. NUTT*. E. T. 1799. K. B. Cowp. 601.

This was an action on a policy of insurance upon the ship *Capel*, in the West India trade, lost or not lost, at and from Jamaica to London, warranted to have sailed on or before the 1st of August, 1776. The policy was effected on the 20th of August, 1776, at a premium of fifteen guineas per cent., to return five per cent. if the ship departed with convoy, and eight per cent. if without convoy for the voyage and arrived safe. At the trial there was no controversy about the facts, and they are shortly these: The ship was completely laden for her voyage to England at St. Anne's, in Jamaica, and sailed from St. Anne's Bay on the 26th of July for Bluefields, in order to join the convey there, Bluefields being the general place of rendezvous for convoy on the Jamaica station, like Spithead in England, and where a convoy then lay, which was expected to sail for England every day; but the greater part of the way from St. Anne's to Bluefields is out of the direct course of the voyage from St. Anne's to England. That she arrived off Bluefields on the 28th or 29th of July, where she was immediately stopped by an embargo laid on all vessels being out of the line of the voyage, and was detained there till the 6th of August, when she sailed with the convoy for England, but afterwards, being separated in the passage, was taken by an American privateer. Upon these facts the jury found a verdict for the defendant.

Sailing from the port of loading to the usual place of rendezvous for the sake of joining convey (there being a warrant to sail with convey) then ready, though such place being out of the line of the voyage, is no deviation.

Lord Mansfield I am extremely glad this motion has been made. The cause came on at Guildhall, by the candour of the parties, in the fairest manner; but I had no intimation of its being a cause of consequence till after the verdict, when I was informed 100,000*l.* depended upon it. The question was fairly tried, and the case has been very well argued on both sides. I have

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thought much of it since the trial; some things are clear, and there are some which require consideration. The policy was made on the 20th of August, 1776, upon the contingency of a fact which must have existed one way or other at the time the policy was underwritten. That contingency was, that the ship should have sailed on or before the 1st of August; consequently it must have taken place or not upon the 20th of that month. The port from whence the ship was to be insured was, if I may use the expression, the whole island of Jamaica, but from which of the ports the ship would sail neither party knew; therefore, they had used the words "at and from Jamaica," by force of which she certainly was protected in going from port to port until she sailed. It follows that the word sailed, in the warranty, must mean that she had sailed on her homeward-bound voyage. The question then is a matter of fact, and one that admits of no latitude, no equity of construction, or excuse. Had she or had she not sailed on or before that day? that is the question. No matter what cause prevented her; if the fact is, that she had not sailed, though she had staid behind for the best reasons, the policy was void, the contingency had not happened; and the party interested had a right to say there was no contract between them. Therefore, what was said by the counsel, in argument, is very true; if she had been prevented by any accident from sailing till the 2nd of August, as by the sudden want of any necessary repair, or if an enemy had been at the mouth of the ports, the captain would have done very right not to sail; but there would have been an end of the policy. It is very different from the case where a voyage has been begun; there the usage of the voyage may justify going a little out of the direct course. This also is clear,—if the ship had broken ground and been fairly under sail upon her voyage for England on the 1st of August, though she had gone ever so little away, and had afterwards put back from the stress of weather or apprehension from an enemy in sight, or had then been put under an embargo and been detained till September, it would still have been a beginning to sail, and the stoppage would have come too late, because the warranty was upon a fact antecedent. Such a case happened before me a day or two after the present action was tried. It was an insurance upon a ship from Grenada to London, warranted to sail on or before the first of August; she had barely began to sail on the day when she was stopped by an embargo, and detained beyond the time. I thought the voyage was begun; the jury were of that opinion, and there has been no motion for a new trial. I am giving no opinion, only breaking the case. Here the whole question turns upon this, did the voyage from Jamaica homeward begin from St. Anne's or from Bluefields? Perhaps where a voyage is once begun, the going a little out of the way to join convoy may be very reasonable and for the benefit of all parties; but still it does not vary the fact of sailing. Here it was very reasonable; but the question whether the voyage began from St. Anne's or Bluefields still remains. Another material circumstance arises from the words "at and from Jamaica." At the trial I reasoned thus: by the terms of the policy she was protected during her stay at Jamaica; by force of them she had a right to go to any port, or all round the island, and she went to Bluefields, for reasons best known to herself; therefore, the voyage began from Bluefields. Had the insurance been at and from the port of St. Anne's, it did strike me that going round the island to Bluefields would have been a deviation. But this is a question of so much value and consequence that the Court wishes to consider the case thoroughly before they give a final decision upon it.

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Where
from a cer-
tain point
there are
different
courses to
the port of
destination,
each having

16. MIDDLEWOOD V. BLAKES. H. T. 1797. K. B. 7 T. R. 162.

The ship was captured by an enemy in her voyage out on the north side of St. Domingo, and carried into the Spanish port of that name, and the assured declared as for a total loss by capture; the defendant paid the premium into court, and resisted the demand on the ground of a deviation from the voyage insured; as to which it appeared in evidence that the ship was entered outwards at the Custom-house, and the clearance of the goods was for Jamaica only; but that she sailed from London, with directions to the captain to touch

in his way to Jamaica at Cape Nicola Mole, in the island of St. Domingo, in order to land some stores there, pursuant to a charter-party entered into for that purpose, after which he was to proceed to Jamaica. The island of St. Domingo lies in the track to Jamaica, and consequently the course of the voyage from London to Jamaica, and from London to Cape Nicola Mole, is to a certain point exactly the same; from that point there are three tracks which a ship bound on the voyage to Jamaica may take, one of them to the southward, immediately off St. Domingo; another still further to the southward; and a third to the northward of that island, in which latter, after the ship in question had passed the dividing point of the three several tracks, but before she had reached the subdividing point of the continuing course to Jamaica, and that leading into the port of Cape Nicola Mole, she was captured. With respect to the three several tracks to Jamaica from the dividing point which the ship passed, it appeared that those to the southward of St. Domingo were the most usual, especially in time of peace, and were the safest navigation; that the other to the northward was the shortest, but more difficult navigation, but was sometimes preferred in time of war by those who are acquainted with it, more especially in the present war, because great part of the island of St. Domingo, including Cape Nicola Mole, being in possession of the British force, there was less risk to be apprehended from privateers. But whether this or either of the other courses was the most advantageous to be pursued in any particular instance, depended upon circumstances, upon which it was proper for the captain of the ship to exercise his judgment at the time. It was not pretended that the captain had in fact exercised any such judgment in selecting this course which he had taken; but it is evident that he had adopted it as the most direct and proper one to be taken for the purpose of going into the Cape, whither he was then bound.

Grose, J. If this case clearly fell within those which have been before decided, I should on that ground have been induced to determine in favour of the plaintiff, it being highly beneficial to the subject to adhere to former decisions. But this case was distinguishable from them; for in those cases the ship was taken before the dividing point, and when she was going in the only course she could take in order to arrive at her place of destination. There being no case to guide us in the decision of this, we must resort to principle. Now it must be remembered that this cause was tried by a special jury of merchants of London, persons peculiarly conversant in commercial transactions, and who perfectly well knew the ordinary risk of such a voyage, and what would vary that risk; and they were of opinion that the underwriter was not liable. It appears that there are several courses to be taken to go to Jamaica; that the most usual passage is the southern one; but that the captain ought to have a discretion to pursue that which at the moment appears to be most advisable; but in this instance the captain had no such discretion; that circumstance should have been disclosed to the underwriters; and that not having been done, I think the plaintiff cannot recover. The determination to take the northern passage, at all events, might very materially vary the risk; for when the ship came to the dividing point, the captain might discover that the northern passage was more dangerous, owing to the circumstances of the moment; and yet he was obliged to take that course in this instance, when the underwriter supposed that he had a discretion to take either the northern or the southern passage, as he should think right.

(b) *What will justify a deviation.*

1. DRISCOL v. BORIL. T. T. 1798. C. P. 1 B. & P. 313.

Per Cur. If a deviation arise from absolute necessity it is justifiable.

2. DELANY v. STODDART. M. T. 1785. K. B. 1 T. R. 22.

Upon a motion for a new trial, the facts appeared to be these: the plaintiff, who lived at St. Kitts, wrote a letter to the defendant, dated the 30th of April, 1781, informing him that he intended to purchase a ship, and offering the defendant a share. On the 14th of May, 1781, he wrote a second letter to the

A deviation from necessity is justifiable;

As from stress of weather;

* Or occasioned by force, see *Scott v. Thompson*, 1 N. R. 181.

defendant, acquainting him that he had purchased the ship, but had only a share in it himself, the residue being divided into three or four more shares, one of which he had reserved for the defendant in case he should wish to be concerned; and directing an insurance upon the ship at and from St. Kitts to London, warranted to sail with convoy. On the 28th of June, the defendant wrote to the plaintiff that he had no objection to a fourth in a share equal to the plaintiff's. On the 3rd of July, the plaintiff informed the defendant that the ship had left the port to take in her cargo; that she let go an anchor at Sandy Point; but, as the wind blew fresh, she drove out and could not come in again; that she was obliged to go to Eustatius; and he therefore hoped that the defendant had not neglected to make the insurance, for fear of accidents. The defendant, on the 19th of July, wrote thus to the plaintiff: "The insurance you ordered shall be done." Plaintiff again, on the 25th of July, wrote, that the *Friendship* did all in her power to get up from St. Eustatius. In addition to which, the following facts appeared in evidence; that the ship *Friendship* had sailed from St. Eustatius on the 1st of August, with the convoy, and that she had afterwards foundered at sea; that St. Eustatius is in the direct road to London from St. Kitts, and the convoy from St. Kitts always looked [212] into St. Eustatius, to take up any ship that might be there; that if the *Friendship* had sailed from St. Kitts she must have gone by Eustatius, but would not have stopped there; that when she was driven to St. Eustatius, after making several efforts to get back to St. Kitts, to finish her lading, and finding she could not succeed, she then took in the rest of her lading at St. Eustatius. At the trial, several grounds of defence were made; but the only one material for our consideration was, that the remaining at St. Eustatius, and not going back to St. Kitts, was a deviation. The learned judge who tried the cause was of opinion that it was not a deviation, being occasioned by stress of weather. Upon this ground, amongst others, the motion for a new trial was founded. After argument at the bar, the Court said: "The only material question is, whether there is a deviation in this case? and that depends on the evidence. If a storm drive a ship out of her voyage into any port, and being there, she does the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven; but here the witnesses say she tried to get back to St. Kitts and could not; and it is a much easier navigation to go directly from St. Eustatius to London, than to go back to St. Kitts first. And as to the taking in the cargo at St. Eustatius, we do not find that the ship lost any time by it. Every thing is the effect of the storm, and occasioned by it. This is the only point on which we had any doubt, and it required some consideration. It was a question, which was proper to be left to a jury, whether this was the same voyage or not, and they have determined it."

3. GUIBERT v. REDSHOW. H. T. 1781. K. B. 2 Park. Ins. 402.

Or going
into port to
repair;

This was an action upon a policy of insurance on the *Nancy*, at and from La Rochelle to the coast of Africa, during her stay and trade there, and at and from thence to her port of discharge in the island of St. Domingo. Three days after the ship sailed from La Rochelle she met with a gale, which strained her seams, and split her mizen-yard and rigging. The crew came in a body to the captain, desiring, for the preservation of their lives, to make to some port to repair. The vessel being a new one, and the captain finding that she had too little ballast, complied, and put into Lisbon, the nearest port, from whence, after taking in 500 rolls of tobacco as ballast, he proceeded to the coast of Guinea, traded there, and the ship was afterwards captured in the sight of St. Domingo, before she arrived. The defendant insisted, that going into Lisbon was a deviation, and called witnesses, who were of opinion that in the latitude in which the storm happened, there could be no difficulty in repairing all the damage the vessel was described to have received, even in the worst weather, as she might have proceeded to the coast of Africa, and repaired there at a less expense; and that a ship loaded like that in question could not need additional ballast. On the cross-examination it came out that

the premium would not have varied had the voyage been by the way of Lisbon. Lord Mansfield left it to the jury, on the ground of necessity to go to Lisbon for repairs. He said that much depended upon the circumstance that no additional premium would have been required for liberty to touch there. If the jury believed the evidence of the witnesses they must find for the plaintiff; for that the whole of the defendant's case rested merely upon surmise and suspicious alone. The plaintiff accordingly had a verdict. [213]

4. ELTON v. BROGDEN. H. T. 1073. K. B. 2 Stra. 1264.

The ship Mediterranean went out in the merchant's service with a letter of marque, and bound from Bristol to Newfoundland, insured by the defendant. In her voyage she took a prize, and returned with it to Bristol, and received back a proportionable part of the premium. Then another policy was made and the ship set out, with express orders from the owners, that if they took another prize, they should put some hands on board such prize, and send her to Bristol, but the ship in question should proceed with the merchant's goods. Another prize was taken in the due course of the voyage, and the captain gave orders to some of the crew to carry the prize to Bristol, and designed to go on to Newfoundland, but the crew opposed him, and insisted he should go back, though he acquainted them with the orders; upon which he was forced to submit, and in his return his own ship was taken, but the prize got in safe. And now, in an action against the insurers, it was insisted that this was such a deviation as discharged them. But the Court and jury held, that this was excused by the force upon the master, which he could not resist, and therefore fell within the excuse of necessity, which had always been allowed. The plaintiff's counsel would have made barratry of it, but the Chief Justice thought it did not amount to that, as the ship was not run away with in order to defraud the owners. So the plaintiff had a verdict for the sum insured.

5. HARRINGTON v. HALKELD. M. T. 1778. K. B. 2 Park, Ins. 304.

In an action on a policy of insurance of the ship Atlantic, warranted to sail with convoy from England to St. Kitts, on or before the 1st of August; the question was, whether there had been a deviation? The ship was separated from her convoy by a storm. The captain said, his object, after his separation, invariably was to gain St. Kitts, or fall in with the convoy, that the ship was taken by an American privateer, in 34 lat. 59 long. Several captains were examined, who swore that they would have taken the same course, to get to St. Kitts, or regain the fleet.

Lord Mansfield. The single question is, whether the captain was taken as he was going to St. Kitts? If he was not, he is perjured. The account gives it, that on the 28th of July there was a storm which separated the fleet; that he did all he could to get to St. Kitts, and to direct his course so as to meet the convoy crossing. The captain goes on the ground not to reason but to obey, be the consequence what it might. He knows nothing of the insurance; he says to himself, if I obey I am doing right. As to the protest, I do not see that it contradicts the captain's evidence. Other captains have looked at the log-book or journal, and they say they would have held the same course. Verdict for the plaintiff.

6. LAWRENCE v. SIDEBOTTOM. H. T. 1805. K. B. 2 Smith, 214; S. C. 6 East, 45. [214]

On the 25th the captor shortened sail, in order to keep in company with La Brava. On the 26th, at eleven at night, they did the same. The captain deposed in his evidence, that he did not do this for his own safety, but in order to protect the captured ship. His own ship afterwards sprung a leak, and was lost; but the captain had not apprehended any danger till the 6th of November, when the vessel was sinking; the captain removed the crew and their clothes into La Brava. The instructions from the owners were, that the captain should take under his protection any ship that he should capture. This cause was tried before Lord Ellenborough, and a verdict was had for the plaintiff. Several objections were made at the trial; and it was first contended,

that the ship was not sea-worthy. The defence was afterwards placed solely on the question of deviation; and it was urged, that there was a deviation, first, when the ship chased and captured *La Brave*; secondly, when she shortened sail and waited for *La Brave*. His lordship left the two questions to the jury; first, whether the ship was sea-worthy at sailing, and next as to the letter of marque; and said that the words of the policy, "with liberty to chase, capture, and man," imported latitude of a licence, which, though difficult to explain, the captain had not exceeded. He however, gave the defendant liberty to move for a nonsuit.

Per Cur. What the captain has said is true, that he did not wait for *La Brave* for his own protection; for, under the instructions he received from his owners, he was to attend upon and convoy the prize. It has been argued, that it is absolutely necessary, under the letter of marque, to convoy the ship into a port; but that argument is fallacious in considering it as absolutely necessary; for the prize may be sent into port properly manned; and, when a ship goes out on a double adventure as this is, the insured ought to have a sufficient crew for both purposes. If this is not absolutely necessary under the letter of marque, then it comes to this question, whether, under a liberty of this kind, the assured can reduce the crew to a dangerous extent by manning the prize, so that she is obliged to keep her company and loiter beyond the proper time of performing her voyage for the purpose of protecting her? We should feel very great difficulty in saying, if a ship should be in danger, another ship which was insured should not stop to assist her. Indeed, if it be a deviation to stop, for the purpose of assistance in distress, we do not understand what can be or not a deviation. But that necessity did not occur in this case; for though the prize once carried away her topmast, that is a very slight and ordinary accident, and she repaired it without assistance.

7. *D'AGUILAR v. TOBIN.* E. T. 1316. C. P. Holt, 185; S. C. 2 Marsh, 265.

It is not a deviation for a ship { 215 } to leave the regular track for the purpose of seeking convoy, when bona fide for the benefit of all concerned, unless expressly prohibited by the terms of the policy.

The ship sailed from Jamaica without convoy on the 6th of July, 1814; arrived at Trinidad on the 10th; sailed from thence on the 1st of August; called at the Havannah; and was afterwards captured, in the course of her voyage to England, by an American privateer. It was objected for the defendant, first, that the captain had been guilty of a deviation in calling at the Havannah; but, it appearing that he had done so for the purpose of keeping convoy, the Chief Justice held, that, as he was acting for the benefit of the underwriters, he must be considered as their agent, and was, therefore, justified in so doing. Secondly, the defendant objected that the voyage from Jamaica without convoy, or a licence from the person authorized to grant licences at Jamaica, was illegal, and called a clerk of the Admiralty, who stated, that Admiral Brown, who then commanded on the Jamaica station, had authority to appoint, and had appointed, convoy, and granted licences. But the orders from the Admiralty, under which Admiral Brown derived his authority, were not produced, and his lordship considered that without them the proof of the admiral's authority was incomplete, and a verdict was accordingly found for the plaintiff.

Per Cur. We will confine the defendant to the point which he has raised; but in such a case as this we cannot refuse to permit his going into this defence. The money should, however, be brought into court, because this is a defence which does not go to the merits; but (on its being urged that the money should be paid in all the actions) only in the present action; for, though there are circumstances under which we should direct the money to be paid into court in all the actions, yet where a defendant has been deprived by mistake of a part of his evidence, we think that is a condition which should not be imposed.

8. *WOOLF v. CLOGGETT.* M. T. 1800. N. P. 3 Esp 257.

Sickness on the part of the master or crew to afford an excuse for a deviation,

The defence relied upon was a deviation. The ship in the course of the voyage, had put into the port of Plymouth, which was out of the common course of her voyage, where she remained fourteen days. The answer set up by the plaintiff to this was, that after the ship had sailed, the captain was taken ill with a severe fit of the gravel; that the mate having pricked his finger by accident, his hand and arm swelled to such a degree, as to render him incapable

of doing his duty; and that they put into Plymouth for the purpose of procuring medical assistance. The facts of the illness of the captain and mate, of their going into Plymouth, and applying to a surgeon there, were proved; but it appeared on the cross-examination of the witnesses, that the surgeon of the ship was unprovided with the proper instruments and medicines.

Lord Eldon, C. J. was of opinion, that if, by the visitation of God, so many of the crew, who were otherwise sufficient, became so afflicted with sickness as to be incapable of navigating the ship, such an illness of the crew was a necessity which might justify a deviation; but when it was set up as a justification of a deviation, he thought it incumbent on the plaintiff to show that he had provided against what was so the act of God, by every proper precaution, as to medicines and necessaries for the voyage, as much as he was bound with respect to the tightness of the ship. It was in evidence that a surgeon was necessary in such voyages as the one insured. If therefore sickness was to be set up as an excuse for deviation, the plaintiff should show that the surgeon was provided with such medicines and instruments as would probably become necessary in the course of the voyage, arising from the common casualties of mankind. He thought in the present case that that had not been done.

(c) *Duty of master in case of deviation.*

LAVABRE v. WILSON. M. T. 1779. K. B. Doug. 234.

The voyage insured was described in the following words: "At and from Port L'Orient to Pondicherry, Madras, and China, and at and from thence back to the ship's port or ports of discharge in France, with liberty to touch in the outward or homeward-bound voyage, at the isles of Franco and Bourbon, and at all or any other place or places what or wheresoever." And there was this additional clause in a subsequent part of the policy, viz. "And it shall be lawful for the said ship in this voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, as well on this side as on the other side of the Cape of Good Hope, without being deemed a deviation." It was in the opening for the plaintiffs insisted, that under the general liberty given by the policy, of touching at all places whatsoever, the vessel might go to Bengal, which, by the operations of those words, was as much part of the voyage as if it had been expressly named. That the ship being there, the voyage might be abridged, and her further progress to China abandoned; for that vessels insured may always return back from any point within the limits of the voyage contained in the policy. Lord Mansfield, however, having intimated a clear opinion that the general words were, by the expressions of "in the outward or homeward voyage," and "in the voyage," qualified and restrained so as to mean "all places whatsoever in the usual course of the voyage to and from the places mentioned in the policy;" this ground was immediately abandoned, and never further mentioned by the counsel for the plaintiffs in the progress of these causes. The plaintiffs rested their case chiefly on another ground, viz. that the voyage to Bengal was adopted by necessity for the safety of the ship, upon the *bona fide* opinion of the captain and the rest of the officers and of one Berard, the supercargo, who had the principal management. To prove this necessity, it was sworn by Berard and four mates that the ship had been detained longer in Europe than at first was foreseen, and that she met with extreme bad weather on her outward passage, and at Pondicherry was so leaky, that it appeared to them, upon consultation, that she must be careened, which could only be done at Bengal, there being no other place so near as for her, in her then situation, to be able to proceed to it with safety, where that operation could be performed; for that no harbour between Pondicherry and the Ganges on one side, and Pondicherry and Bombay on the other, would admit of so large a vessel being hove down, her burthen being near 800 tons. Indeed, it turned out when they got to Bengal, that she could be repaired without careening; but this was only discovered, they said, after she was

* An authorised restriction imposed by the assured on the captain's election is immaterial, when the event proves that he would have no opportunity of making one; *Hewitson v. Allout*, 1 M. & S. 46.

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unloaded of much more of her contents than could have been done with safety in the open road of Pondicherry. All the witnesses for the plaintiffs swore that they took the resolution of going to Bengal much against their inclination; for that it would have not only been more for the advantage of the owners, but also more for their private interest as individuals, to go to China, they having prepared their own adventures for that market. Besides the circumstance of the leak, they assigned an additional reason for relinquishing the voyage to China, viz. that they had been detained so long at Pondicherry, from delays in unloading their outward-bound cargo, that they were not ready to leave that place till it was too late to undertake the China voyage with any degree of prudence or safety; and they said Bengal was the best place they could go to winter at.

Per Cur. If this application were upon the ground of impeaching the testimony of the plaintiff's witnesses, whatever our private sentiments might be, after two concurrent verdicts we should not be inclined to interpose. But without impeaching there ought to be a new trial, or rather that the case has been ill decided. The question is, whether without imputation on any body, circumstances have not happened to take the voyage out of the policy? A deviation from necessity must be justified both as to substance and manner. Nothing more must be done than what the necessity requires. The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional or another voyage for that which has been insured. If the voyage to Bengal was unavoidable, where was the necessity to trade? All the ports touched at were out of the direct course, and six weeks or two months were consumed, instead of six days. The justice of the case required a different decision.—The rule must be made absolute.

(M) RELATIVE TO THE NATURE AND EFFECT OF LIBERTY BEING GIVEN, BY THE TERM OF THE POLICY, TO TOUCH, &c. &c., AT PARTICULAR PLACES.*

(a) *License to touch.*

1. MELLISH v. ANDREWS. M. T. 1812. K. B. 16 East, 312; S. C. 5 Taunt. 495.

Liberty to touch at any port or ports for orders does not warrant the assured's resorting to the places [218] tracing his course.

Policy of assurance on goods at from London, to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders or any other purpose; and to touch and stay at any port or places whatsoever and wheresoever. The Court held that the ship having touched at C. for orders, and gone to S., a more distant port, for further orders; and having received orders at G., because it was unsafe to land there, to return to C. and wait for orders, might so return to C. without being guilty of a deviation; it being found that she went to S. for orders in the prosecution of her voyage, and returned to C. to obtain orders as to the further progress of the voyage, and no fraud being found.

2. GARDNER v. SENHOUSE. T. T. 1810. C. P. 3 Taunt. 16.

If a vessel call at more than one of the places of call, she must take them in the order named, or in the usual course when not named in any order.

Action upon a policy from London to Trinidad, or the Spanish Main, with leave to call at all or any of the West India islands or settlements, and with liberty to touch and stay at any ports or places whatsoever and wheresoever. The ship having got to Demerara, she gave up all idea of going to the Spanish Main, for she was going to Martinique; and the captain had no instructions for Trinidad, either from England or Demerara; and the touching at Martinique was quite inconsistent with the prosecution of the voyage to Trinidad or the Spanish Main. The ship thence goes to St. Thomas, probably for a commercial purpose; but it is quite out of the voyage to Trinidad, and it seems also out of the voyage to the Spanish Main.

* The strictness with which the law regards deviation has occasioned the introduction of a clause, which is now inserted in every policy, by which it is declared that, "it shall be lawful for the ship, &c. in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever," or at certain specified places, as "all or any of the West India Islands, &c." with the addition, when necessary, of the words "forwards and backwards," and with leave to return (or according to circumstances of the case) without prejudice to the insurance.

Per Cur. At the trial the defendant was not so well prepared for trial as might be, for reasons of surprise which he has assigned. The assured contended at the trial, that he had a right to go to St. Thomas's first, and then to Trinidad, as within the liberty; and the jury was accordingly directed; so that it has never been left distinctly to the jury, whether the ship was in her voyage to Trinidad at the time of her loss. And though at the trial the judge was struck with the largeness of these words, as giving liberty to the ship to go any where she pleases, to any island in any course, it must be confined to the voyage insured, that is, to some port in the course of the voyage to Trinidad and the Spanish Main; otherwise we do not see where the voyage is to end; they might make it last two years, by going to every West India island except St. Domingo and Jamaica; and the larger the words are the more necessary is this construction; else the ship might trade and barter without any termination. It is, therefore, very fit there should be a new trial in this cause, not waiting for another cause to be tried; and as it was not tried, owing to my misunderstanding of the policy, it must be without costs. *Lavabre v. Wilson* is very strong; and the case of *Hogg v. Horner*, in *Marshal*, is prodigiously strong; for the number of ports in Portugal being very small, and the extent of the coast short, there is the less necessity for the restriction of taking it in course of the voyage from London to Portugal; but for these reasons we think this liberty must be restricted to places to be taken in the course of the voyage from London to Trinidad and the Spanish Main, and that there must be a new trial.

3. *VIOLETT v. ALLNUTT*. E. T. 1811. C. P. 3 Taunt. 419.

The plaintiff, intending to ship goods on the voyage insured to the amount of 3,130*l.* 14*s.*, caused insurance to be effected for that sum. That the goods loaded on board the *Lion*, at Plymouth amounted, including charges, to 1,880*l.* 16*s.*; that the ship proceeded from Plymouth to Penzance, for the purpose of completing her lading, and there received on board, on account of the plaintiff, the remainder of her cargo, consisting of 651 hogsheads of pressed pilch-ards, amounting, including charges, to 1,242*l.* 8*s.* That while the ship was lying at St. Michael's Mount Pier, at Penzance, waiting for a favourable wind to proceed on the voyage, she was stranded, and the cargo received damage, by which a general and a particular average was incurred. That the general average, and the particular average upon the goods taken in at Plymouth, amounted together to the sum of 23*l.* 8*s.* 6*d.* per cent., which the defendant had paid into court; and the particular average on the goods loaded at Penzance amounted to 19*l.* 12*s.* 4*d.* per cent., which the defendant contended he was not liable to pay by the terms of the policy in question. It was agreed that the only question to be tried was, whether the defendant was liable for the loss on the goods taken on board at Penzance? and that in case a verdict should be found for the plaintiff, the same should be held for 39*l.* 4*s.* 8*d.* being the remainder of the sum claimed in this action. The jury having found a verdict for the plaintiff, it was moved to set it aside, upon the ground that the permission to touch at Penzance did not include the touching there for the purpose of taking in further cargo, and that by the terms of the policy the insurance attached only on the cargo to be loaded at Plymouth. But the Court held there was no weight in the objections.

4. *MELLISH v. ANDREWS*. M. T. 1813. K. B. 2 M. & S. 27.

Policy of assurance on goods at and from London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders or any other purpose. and to touch and stay at any ports or places whatsoever and wheresoever. The ship having touched at C. for orders, and gone on to a more distant port for further orders, and having received orders at S., because it was unsafe to land there; the counsel for the plaintiff stated the question intended to be raised by the defendant on this special verdict to be, whether, on the construction of this policy, it being found by the jury that the assured were in the *bona fide* prosecution of the voyage, they were at liberty to go back to Carlsham a second time for orders? He contended that they were;

A policy on goods at and from A. to B., with liberty to touch at C. for any purpose whatsoever, being ginning the adventure from the loading as above, includes liberty to touch at C. for the purpose of taking in part of the goods as sailed.

Under a policy at and from London to the ship's discharging port or ports in the Baltic, not specifying any parti

cular port, that they might retrace their steps, and seek a port in an inverse order; and with liberty for that he referred to the terms of the policy, which he said were as large as possible, to indicate an intention of leaving to the assured a discretion to act according as circumstances should require. The policy specifies no port of destination; it is only to the ship's discharging port; and this is accounted for by the state of the Baltic trade at that time, which rendered it impossible to ascertain beforehand a port of safety. The language, therefore, of the policy was adapted to the shifting condition of the Baltic commerce, and did not limit the assured to any particular port. And as they had an ultimate port to seek, they had also liberty "to touch at any ports for orders or any other purpose," without restriction as to the particular course in order of touching at such ports. This, indeed, is denied by the defendant and upon this the question turns. It is admitted that the assured might seek a port of discharge any where within the Baltic; but it is denied that they were at liberty to touch at ports in any other than a progressive order, and that having once touched at a port, they could return thither. But it is obvious that such restriction might defeat the whole object for which the liberty was given, and indeed the voyage itself; for, suppose the ship in the first instance had gone to the most distant port in the Baltic for orders, and been frustrated in her expectations, there, according to the argument of the defendant the liberty would be extinct, because every port at which she could afterward touch for orders would be in a retrograde course; and if she could not touch for orders, neither is it possible to conceive how she could ever reach a port of discharge. It, therefore, seems an answer to such an argument to say, that the policy contains no such express restriction, and that to imply one would be contrary to the apparent intention of the parties.

Per Cur. The question is, whether the ship was not under the protection of the policy in her return back to Carlsham? The contract of the parties must depend on the terms of the policy, which do not point out any definite port of discharge. The policy is "at and from London to the ship's discharging port" generally, "with liberty to touch at any ports for orders or any other purpose." That is as large as possible. What reason or authority is there which says, that where a particular port of discharge is not fixed, and where there is a liberty to touch at any ports for orders, their having once touched at a port, and having been told to go back to that port, the assured must go on elsewhere to another port, where, if it be hostile, the inevitable consequence would be that the ship must be lost? The argument is, that the ship should have discharged the orders at Swinemunde, and not have gone back. If she had done so, she would not then have been under any orders to go to her port of discharge. I think, therefore, that the ship was under protection of the policy in the same manner as if the words "backwards and forwards, or sideways," had been introduced.

5. *ANDREWS v. MELISH.* E. T. 1814. C. P. 5 Taunt. 496.

Under a policy from London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders or any other purpose; it was admitted that the assured had not an indefinite liberty, but that the course pursued was within the meaning of the contract. Though it was not competent to refer to the state of Europe for the circumstances that dictated the terms of the policy, yet the expressions used showed that there was some necessity which induced the parties to contract for a larger liberty than usual. It was not necessary that the port where the ship was to receive her orders should be in the course to the discharging port. No distinct point of the Baltic being named, to which the ship should go for orders; she might go for orders to the most extreme point, which would render it necessary for her to take a retrograde course from that point to her port of discharge; otherwise the liberty given should have been thus limited,—to call for orders at any port in the Baltic, provided her port of discharge lay beyond it. The probable duration of the time to which the risk may extend is a matter for the consideration of the parties before they enter into the contract; but it cannot

Policy from London to the ship's discharging port in the Baltic, with liberty to touch at any port or ports for orders; the ship may, before her discharging port is fixed, go backwards or forwards to ports for

affect the construction of the policy. If the liberty given had been abused by [221] waiting a time in the Baltic, while the assured were waiting for political orders in changes, that would have been a good ground of defence on the merits; but here it is to be inferred that the plaintiff has made only a fair use of the policy. any success what over.

Per Cur. The facts are, that the ship sailed from Lisbon to the Baltic in search of a port to discharge her cargo; she then proceeded to Carlsham; the agent there and the assured directed the master to proceed to Swinnemunde; he proceeded with the ship to Swinnemunde, and was told by the agent of the assured at that place that he could not safely land there, and should return to Carlsham for orders. In obedience to these directions he did return to Carlsham, and sustained some damage in his way thither; and while he was repairing it at Carlsham, the ship was seized there by the government of the country, and the cargo thereby lost. For the plaintiff in error it has been contended, and that truly, that upon an insurance at and from London to the ship's discharging port or ports, the assured is not at liberty to take those ports in any order other than that in which they lie in, proceeding from the *terminus a quo* to the first of such ports, and so from port to port, until he comes to the last. Also, that under the liberty to touch and stay, the assured cannot touch and stay at any port otherwise than in the abovementioned line. To all this we agree; but in all the cases which have been decided on that principle, the ship's port or ports of discharge has been a fixed point, to such cases the principle may be applied. The ship's port of discharge being fixed, she is not warranted in passing beyond her port of discharge and returning to it again. In the case of *Chason v. Simmonds*, where the insurance was from London to the ship's port of discharge in the Straits as high as Messina, the assured elected Genoa. In the present case, it was important that the power of electing the port of discharge should be continued to the very latest hour of the voyage. It is evident from the liberty to seek for orders in any port or ports of the Baltic, without referring to the knowledge we have of the then existing state of the Baltic, that this must have been the intention of the parties. It follows, that the assured must have had agents at several ports in the Baltic to which he could apply his ship for orders; at Carlsham the master is referred to Swinnemunde, but not as a port of discharge; it is only for orders. He goes to Swinnemunde, and there receives orders to go back again to Carlsham. The orders he received at Swinnemunde are such as rendered it impossible for him to do any thing else except to go for further orders to Carlsham; he does accordingly go thither, not having then as yet ascertained what was to be the ship's discharging port, and upon arriving there he is taken. We are of opinion, that under a policy worded as this is, the assured had a right to go backwards and forwards from port to port for orders, as his port of discharge, until his port of discharge was fixed.

6. *RAIN v. BELL*. H. T. 1808. K. B. 9 East, 195. S. P. URQUHART v. BAR- [222]
NABD. H. T. 1809. C. P. 1 Taunt. 450.

Insurance at and from the ship's loading ports on the coast of Spain to London, with liberty to touch and stay at every port or place whatsoever. The jury found expressly, that the going into and staying at Gibraltar was of necessity, in order to procure a supply of provisions; and that the stay was not longer than the necessity required; and it was proved that while the vessel lay there the captain received on board some chests of dollars. This fact, and this finding of the jury, raised the question of law, whether the taking in the additional cargo of dollars was a breaking of bulk in the course of the voyage, at a place where there was no liberty to trade given by the policy, so as to avoid it, as increasing or having a tendency to increase the risk? The point was very fully argued, and the counsel who argued that this amounted to a deviation relied on the case in 4 Esp. 25. But the Court were unanimous in deciding (and they delivered their opinions *seriatim*), that as the jury had found that the whole period of the ship's stay was covered by the necessity which originally induced her to go into Gibraltar, there was no implied warranty in such a policy that the ship shall not trade, so as no delay be actually occasion- A policy is avoided by trading at an intermediate port at which the vessel has lawfully touched, provided the risk is not thereby enhanced or the voyage delayed.

Policy of insurance from Para to New York, with leave to

call at any of the windward and leeward islands on the passage, and to dis

[229] charge, exchange, and take on board the whole or any part of any cargo, at any port or place particularly, at all or any of the windward and leeward islands, with out being deemed any deviation; held, that in this policy the ship having proceeded to two of the leeward islands for a purpose wholly unconnected with the voyage, that it was a deviation, and vitiated the insurance.

By a policy a ship was insured at and from Hull to her port or ports of loading in the Baltic Sea and Gulf of Finland, with liberty to proceed to, and touch and

ed. And as to the temptation to deviate, held out to the master, that must always be a question for the jury, as in other cases of fraud, whether the deviation or delay arose from the trading or from necessity; and an intention to deviate, not carried into effect, will not avoid a policy; still less can a temptation to deviate avoid it.

7. HAMMOND v. REID. M. T. 1820. K. B. 4 B. & A. 72.

The ship sailed from Para on the voyage insured, with a cargo on board, bound for New-York; but with orders from the plaintiff, her owner, to proceed in the first instance to Barbadoes, where the captain was directed to sell the cargo and receive other goods on board in exchange for it, and proceed from thence to New York, after calling at the islands of St. Bartholomew and St. Thomas, two of the leeward islands, for the purposes after stated. When the vessel sailed from Para the plaintiff was there, and intended to proceed from thence in another vessel direct to New York, where he expected to meet a vessel, also belonging to himself, called the Alice, from Liverpool, which last mentioned vessel he then proposed to load at New York, with goods for the said islands of St. Bartholomew and St. Thomas, and directed the captain of the Arabella, after finishing his trading at Barbadoes, to proceed to St. Bartholomew and St. Thomas, for the purpose of obtaining information in regard to the state of the market, and on other subjects at those islands, with the view of forming his opinion upon the speculation he proposed to enter into by the said ship Alice, from New York to those islands. The Arabella arrived at Barbadoes on the 5th of March, 1817, where she discharged her cargo, and received on board a quantity of sugar, with which she sailed for New York on the 4th of April following, intending to call at St. Bartholomew's and St. Thomas's, two of the leeward islands, in her way to New York. In the course of this voyage, after having passed the islands of St. Bartholomew and St. Thomas, she was lost off Savannah. When the ship sailed from Barbadoes, on the 4th of April, her objects of trade were at an end, until she should arrive at New York; and she proceeded to the islands of St. Bartholomew and St. Thomas only to obtain information for the purpose before stated. It was for the plaintiff contended, that the going to the islands of St. Bartholomew and St. Thomas, was no deviation. Here is an express leave given to touch at all or any of the windward or leeward islands. Under that liberty the vessel had a right to go to the islands in question.

Per Cur. This calling at the islands of St. Bartholomew and St. Thomas, was for a purpose wholly unconnected with the voyage in question. If, as it was said, the intelligence to be obtained there would be likely to have altered the destination of the ship, the question would be different. But the contrary is expressly stated in the case; for it is stated, that it had a reference to some new adventure to be subsequently undertaken in another vessel. We think, therefore, that this being a calling for a purpose entirely unconnected with the voyage, was, notwithstanding the words in the policy, a deviation, and that the plaintiffs were entitled to recover.

8. SOLLY v. WHITMORE. M. T. 1812. K. B. 5 B. & A. 45.

The defendant subscribed a policy of insurance upon the ship *Seeman*, and the risk was "at and from Hull to her port or ports of loading in the Baltic Sea and Gulf of Finland, with liberty for the ship in the said voyage to proceed and sail to, and touch and stay at any port or places whatsoever and wheresoever, for all purposes; particularly at Elsinore, without being deemed a deviation." The policy was effected by the plaintiffs on behalf of James Phillips, who then resided at Königsberg, in Prussia, and was the party interested in the insurance as owner of the ship. The ship, on the 3rd of October, 1818, began loading on board at Hull sundry packages for Elsinore, sundry other packages for Dantzic, and sundry other packages for Pillau; and on the 23rd of October, in the same year, set sail from Hull on her voyage for Elsinore, Dantzic, and Pillau, the latter being her intended port of loading. The ship touched at Elsinore, and loaded there the goods destined for that place; she afterwards sailed for Dantzic, and arrived there on the 15th of December,

1818, and was delivering the goods destined for Dantzic until the 19th of December, 1818, when she proceeded to Pillau, to deliver the remainder of her cargo. On the 21st of December, 1818, the ship, when in sight of Pillau, was totally lost by the perils of the sea. The premium mentioned in the policy was returned by the defendant to the plaintiffs before commencement of the present action. It was admitted, that it was now settled by the case of *Rucker v. Allout*, 15 East, 278. that the liberty to touch at any port or place whatsoever for all purposes, must be taken to mean for some purpose connected with the voyage.

Per Cur. The liberty given by this policy, to touch at any ports for all purposes, must be construed to mean purposes connected with the voyage. Here the voyage was from Hull to a loading port in the Baltic; and if the ship had gone to Elsinore or Dantzic, to see if she could get a cargo, that would have been a purpose connected with the voyage, and consequently would not have been a deviation. But the vessel in fact went to those ports for the purpose of delivering goods, which was wholly unconnected with the object of the voyage insured. Judgment of nonsuit.

9. *URQUHART v. BARNARD*. H. T. 1809. C. P. 1 Taunt. 450.

The plaintiff had effected a former policy to the amount of 1,400*l.* upon the ship *De Sangano*, and 300*l.* on her cargo, at and from Lisbon to Madeira, and Santos, in South America, with liberty to change the property at Madeira; that Camacho, Belford, and Co., the owners, by a letter written from Lisbon addressed to the plaintiff, had requested him to alter the insurance effected on the *De Sangano*, instead of Madeira to Santos, Madeira to the Cape de Verd Islands, where she would take in salt, and Santos, to the same amount on the brig, and to the amount of 1,500*l.* on goods. In consequence of this letter the plaintiff procured to be indorsed on the policy a memorandum, by which, in consideration of one guinea per cent., the underwriters who signed it agreed to permit the vessel to touch at one port in the Cape de Verd Islands, to take in salt. The plaintiff also soon after effected the further policy upon which this action was brought, for 1,200*l.* on goods by the *De Sangano* at and from Madeira to Santos, with liberty to touch at the Cape de Verd Islands. The policy also contained liberty to touch and stay at any port or places whatsoever, without being deemed a deviation. The loss of the plaintiff's interest and the defendant's subscription of the policy were admitted. The ship sailed from Lisbon, and took in an additional cargo at Madeira, from whence she sailed, bound for Santos. In the course of the voyage she touched at Bona Vista, one of the Cape de Verd Islands, where she remained several days, and loaded a considerable quantity of salt there as merchandize. The defendant contended that this was an equivalent to a general trading, and was, therefore, a deviation, which increased the risk and avoided the policy; for, that though the memorandum indorsed on the former policy gave liberty to touch and take in salt, the policy now sued on gave only liberty to touch, not to touch and trade. A witness proved, and the jury specially found, that the letter above-mentioned was communicated to the agent who signed the policy for the defendant. It was contended that this letter was not admissible evidence; but Mansfield, C. J., received it, and a verdict was found for the plaintiff, with liberty to move to set it aside, and to enter a nonsuit.

Per Cur. The question is, whether the ship having liberty to touch at the Cape de Verd Islands, without any reason assigned for it in the policy, the staying there a little time and taking in this salt, without any proof that the loss was at all occasioned thereby, is to be considered as a trading which vacates the policy, because, as it is said, the memorandum gave only liberty to touch, not to touch and trade. It is doubtful, nor can we find it any where defined, what is the precise meaning of liberty to touch, as contradistinguished from the meaning of liberty to touch and stay. No case decides the difficulty, though there must be some difference between the two phrases; but the time of staying in both instances is perfectly undefined; and no case decides how long, or for what purpose, a ship may stay under the licence of these

clauses. We have been always extremely averse to receive partial evidence to vary or explain a written contract; but under the circumstances of this case the Court is of opinion that the latter was admissible evidence, and that it explains the word "touch;" and since it was communicated to the underwriters, they must have known for what purpose this word was introduced into the policy; they must have known that the ship was to trade there, and that the policy contemplated this act. It was assumed, in the course of the argument, that the taking in salt was equivalent to a general trading; but that is not so. For the purposes of a general trading it might have been necessary to unload all the cargo, and consume much time; it does not necessarily follow that much time was consumed in taking in salt. It is not, therefore, to be concluded that the "liberty to touch" authorizes a general trading. It was truly said, that if a general custom had been proved for ships from Madeira to Santos to call at the Cape de Verd Islands, to take in salt, it would have been a sufficient answer to the objection which imputes a deviation. And upon what principle? because, if the underwriters knew, by the general custom of the trade, that the touching at those islands is for the purpose of taking in salt, the assured are entitled to do it. If then the underwriters knew the same thing by means of an express communication of the purpose of touching, which is, in this instance, proved to have been made, it is the same thing as if they had had notice by the general usage of the trade.

Where a ship insured at and from Lisbon had liberty to call at any one port in Portugal for any purpose whatsoever, held that the permission must be restrained to the northward ports on her way to England. If a ship, with a very extensive liberty to touch or stay, and land, load, and exchange goods, enter a port and stay there so long for the purpose of trade that she loses her convey, the underwriters are discharged on the ground of deviation; for the liberty must be construed with reference to

10. *HOGG v. HORNER*. T. T. 1797. K. B. 2 Park. Ins. 394; S. C. 1 Marsh Ins. 186. *S. P. RONTRESS v. REEVE*. 2 Park. Ins. 445.

A ship was insured at and from Lisbon to a port in England, with liberty to call at any one port in Portugal for any purpose whatever, and when the ship had sailed from Lisbon, to Farco, to complete her loading, Farco being a port to the southward of Lisbon, consequently, lying directly out of the course of the voyage to England.

Lord Kenyon. I am of opinion that the liberty given by this policy must be restrained to a permission to call at some one port to the northward of Lisbon, in the course of the voyage to England, and that by going to the southward the assured has been guilty of a deviation.

11. *WILLIAMS v. SHEE*. M. T. 1813. K. B. N. P. 3 Campb. 469.

Policy of insurance at and from London to Berbice, with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods without being deemed a deviation. The vessel sailed from Portsmouth on the 25th of September, 1812, with a fleet for the West Indies, under convoy of his Majesty's ship *Narcissus*; they arrived off Madeira on Saturday, the 17th of October. The Sir Sidney Smith had taken in a quantity of goods for that island, which the captain had been ordered to land there, and for which wines were to be sent on board. He began to land the goods as soon as he arrived, but not being allowed to work on the Sunday he had not got the wines on board till the Monday at noon. The *Narcissus*, with the greatest part of the fleet had sailed away the preceding day, and was then too far off to be overtaken; seven or eight other ships belonging to the fleet, however, were left behind at Madeira, and they all agreed to sail together for mutual protection. With this view the Sir Sidney Smith remained at Madeira till the 24th of October; she finally parted company with them off Barbadoes, and on the 19th of November was captured by an American privateer, on her way to Berbice. The owner of the goods insured was on board during the voyage. It was contended that the underwriters were discharged on two grounds: 1st. The ship, by putting into Madeira, and staying behind there when the rest of the fleet had sailed, had been guilty of a deviation. 2dly. The captain had wilfully deserted the convoy; and as this was done with the privity of the owner of the goods, who was on board, the policy was vacated.

Lord Ellenborough. The liberty in the policy must be construed with reference to the main scope of the voyage insured. I am inclined to think this was not a wilful desertion of convoy within the meaning of the act, as the captain

appears to have acted *bona fide*, and not to have been aware of the precise time when the convoy sailed away from Madeira.—Plaintiff nonsuited.

12. METCALFE v. PARRY. M. T. 1814. N. P. 4 Campb. 123.

Policy on ship at and from Antigua to England, with liberty to touch at all or any of the West India islands, Jamaica included. The ship arrived at Antigua before that day, and continued there till the 1st of November, when not being able to procure a full homeward cargo she sailed for that purpose to St. Kitt's, which is out of the line of the voyage to England. Here she remained to complete her cargo till the 15th of January following; she then sailed for London, but met with so much damage on the voyage that she was forced to put into Falmouth, and was abandoned to the underwriters.

Gibbs, C. J. I think the plaintiff is entitled to recover. The policy appears to me to have authorised the ship to go to St. Kitt's, and to remain there till her homeward cargo was completed. There is a liberty to touch at all or any of the West India islands, Jamaica included; this shows decisively that they might be taken without any regard to their geographical order. Jamaica is at least 500 miles out of the direct course from Antigua to England; then does not the whole scope of the adventure, as described in the policy, show that the ship was to go about from island to island, if necessary, for the purpose of seeking for freight? What could be the object of the liberty given her to touch at Jamaica, if she could not stay there to take in goods? Was she to go 500 miles out of her way for the mere pleasure of viewing that island and asking for news? The gentlemen of the jury say that this is the winter premium; and that shows that a winter risk was in the contemplation of the parties.—Verdict for the plaintiff.

13. ARMETT v. INNES. H. T. 1820. C. P. 4 Moore, 150.

The voyage of the policy was described as "at and from London to New South Wales, and at and from thence to the ship's loading port or ports in the East Indies, Persia, China, or elsewhere, forwards, and backwards and forwards, as well on the other side as at and on this side the Cape of Good Hope, in ports and at sea, at all times and in all places, on all services, until her safe arrival at her final port of discharge in Great Britain." And in the body of the policy was incorporated, that "it should be lawful for the vessel in the voyage insured, to proceed and sail to, and touch and stay at any port or ports, or places whatsoever and wheresoever, and for all purposes whatsoever, without being deemed any deviation, and without prejudice to the insurance." It appeared in evidence that the vessel went with convicts from London to New South Wales; that, having discharged them, she went from thence in ballast to Batavia, where she took on board a quantity of iron in bars, which she discharged at Sourabaya, and was there loaded with a full cargo of rice; that she then sailed therewith for the Mauritius, where 250 tons of rice were unloaded, as it was intended to ship cotton on freight, in lieu thereof; but that having unloaded the above 250 tons, it was discovered that the ship had sustained an injury in the previous part of the voyage, and she was ultimately broken up. For the defendant, among other objections, it was insisted, that this was a deviation from the voyage warranted by the policy, as the risk insured against was only to the ship's loading ports, but no liberty was given to trade, unload, or take in a fresh cargo, or to continue to trade for any indefinite period.—Dallas, C. J., however, was of opinion that though a liberty to trade was not given by the policy, still that it embraced sufficiently general and comprehensive terms to cover the voyage in question, and that as to the period for which the voyage was to be limited, it must be considered a reasonable time; that it was the duty of the underwriter to know the nature of the trade, which appeared in this case to be to go from port to port, and trade or barter in the manner proved. The jury accordingly found a verdict for the plaintiffs.

Per Cur. Looking at this policy, the finding of the jury, and the construction the Court ought to put on the instrument, we think this verdict ought not to be disturbed. The terms contained in the policy cannot be more general or extensive. The voyage insured against is from London and back. Poli-

the main scope of the voyage insured.

Under a policy from Antigua to England, with liberty to touch at all or any of the West India islands (Jamaica included), the ship may touch at any of the West India islands, though not in the direct course from Antigua to England, and stay at such as she visited the

227 | time necessary for completing her homeward cargo. On a policy at and from London to New South Wales, and thence to the ship's loading port or ports in the East Indies, and elsewhere, and that she might proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever and for any purpose whatsoever; the ship sailed from London with

convicts to New South Wales, where, having discharged them, she proceeded in ballast to Batavia, where she took on board a quantity of iron, and discharged the same at Sourabaya, and was there loaded with a full cargo of rice, with which she proceeded to the Mauritius, where it was discovered she had sustained an injury, and she was accordingly broke up. Held to be no deviation.

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(b) *Licence to cruise.*1. *PHELPE V. AULDJO.* M. T. 1810. K. B. N. P. 2 Campb. 350.

When a policy is effected in the usual form, the ship cannot be lawfully employed for hostile purposes, except in a case of necessity, or where express liberty is given by the terms of the policy.

Action on a policy of insurance. The only question was, whether the master had not been guilty of a deviation. It appeared that while he lay at Iceland, and when he had taken in almost the whole of the cargo, the captain of an English ship of war lying near him, the topmast and yards of which were then struck, ordered him to go out to sea to examine a strange sail, which was discovered in the offing, bearing enemy's colours; that the master did not remonstrate against this order, but unmoored and put out to sea; that although forty of the crew of the ship of war had been on board the *Margaret* and *Anne* in the morning of the same day, they had all been withdrawn before he began to unmoor, and that no violence or threats were used to induce them to do so; that he fired two guns at the strange sail, and brought her to, when she appeared to be a neutral; and that he then returned to his moorings. Being examined as a witness, he considered himself bound to obey the orders of the captain of the ship of war, but he did not make any protest upon the occasion.

Lord Ellenborough. I am of opinion that this is an unexcused deviation. Where is the *vis major*? The master is not proved to have acted under any duress or compulsion. If a degree of force was exercised towards him, which either physically he could not resist, or morally, as a good subject, he ought not to have resisted, the deviation is justified: but if he chose to go out, in the hope of making a prize, he could not thereby extend the risk of the underwriters. Suppose the ship had been captured when she went out upon this cruise; were the underwriters to bear the loss? The purpose might be laudable, and a compensation to the owners would probably have been made by government; but when the ship engaged in this hostile adventure, the voyage insured was at an end.—Plaintiff nonsuited.

2. *PARR V. ANDERSON.* H. T. 1805. K. B. 6 East, 207.

Whether an insurance of a ship "expressly declared to be with or without letters of marque," upon a commercial adventure, enables her to chase for the hostile

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purpose of attack, is not settled; but the mere words "with or without letters of mar

This was an action upon a policy of insurance, in which the adventure was described "at and from Liverpool to the ship's ports and places of trade on the coast of Africa and African islands, during her stay and trade on the said coast and islands, and at and from thence to her final port or place of sale, delivery, or discharge, in the British West India Islands, &c. declared with or without letters of marque."

Per Cur. The question made at the trial was upon the effect of these latter words, by which the assured was expressly authorized to carry a letter of marque, if she should think fit. On the part of the plaintiff it was contended, that these words authorized the ship carrying a letter of marque to chase any vessel described at whatever distance in the course of the voyage, for any indefinite period of time, and in whatever course or direction the ship insured might, in virtue of such pursuit, be induced to sail; and that no deviation incurred in the course of such pursuit discharged the underwriters. On the other hand it was contended, that the terms of this policy having designated a mere commercial adventure between certain prescribed limits, that the liberty of taking a letter of marque must be construed with reference, and as subservient to the main objects of such an adventure, incorporating only therewith such a portion of hostile risks as might form the use of a letter of marque, for purposes originally or ultimately of a defensive nature and which an act of aggression might, in some cases, and with a view only to ultimate defence and

safety, properly be; and that under such a liberty of carrying a letter of marque, *que,*" do not author
no deviation from what would otherwise be the natural and ordinary course of the voyage for the purpose of pursuing, in quest and for the chance of prize, *ize cruising*
vessels, which at the time of instituting and pursuit, were not even known to belong to an enemy, was warranted. To this opinion, viz. that hostile adventure to this extent was not protected by a liberty to carry a letter of marque, *out of the course of the voyage*
Lord Ellenborough, C. J., at the trial inclined, and directed the jury to that effect. *in search of prizes.*
The *Nisi Prius* case of *Jolly v. Walker*, Park, 209. was cited as an authority, that a ship having letters of marque might chase an enemy without being said to have deviated; but it was supposed that that case might resemble the present in the liberty it contains of carrying a letter of marque; but upon inspecting the policy, it is found to contain no such form of words. The voyage insured in that case was "at and from London to Cork and the West India islands, with liberty to call at St. Eustatia;" and the policy contained this warranty, "to proceed on a voyage with sixty men equipped with twenty-two guns, and six-pound shot, and sheathed with copper, which indicated an intention at least to employ, or to be prepared to employ, a competent degree of force for hostile purposes. And it was contended, that it amounted to a representation at least of an intention to use the vessel as a private ship of war; and that, in virtue of her having a letter of marque, she was in a situation and had a capability of being so used. This case, supposing what the note in Mr. Park's book states to have passed, affords no construction of a policy containing the liberty in question, inasmuch as that policy contained no such liberty. In the absence, therefore, of any determination on the effect of such words, where the words are susceptible of different meanings, where, if understood in their fullest latitude, they authorize the acting as a letter of marque for all purposes; that is, in other words, as "a private ship of war," including, of course, the liberty of cruising, in order to take, and of bringing into port when taken, vessels of that hostile nation against which the letters of marque are directed; an extent in which the plaintiff's counsel have not argued that these words should be understood; where it is difficult to allow what is contended for, i. e. an indefinite right of chasing, for the purpose of capture, all vessels, and in whatever direction; and that *toties quoties*, whensoever and wheresoever successively descried, provided the original pursuit commences from a point in the course of the voyage, without suspending or superseding wholly the objects, destination, and limits of the commercial adventure described in the policy; we say, under such circumstances of novelty, in point of question, as far as respects any judicial determination upon the effect of these words, and considering the difficulties which attend the construction of them, either in their most extended or limited sense, it may be material to ascertain, as a question of fact, in what manner the parties to contracts containing this form of words have acted upon them in former instances, by paying losses where deviations of the kind now in question have happened; and whether they have as yet obtained, in use and practice, as between assured and assurers, any and what known and definite impost. We think it fit that for these purposes this case should undergo a second trial.

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3. *STERS v. BRIDGE*. M. T. 1780. K. B. Doug. 527.

Action against an underwriter on a policy of insurance on the ship *Mary*, a letter of marque. The words of the policy were, "at and from Liverpool to Antigua, with liberty to cruise six weeks, and to return to Ireland, Falmouth or Milford, with any prize or prizes. It appeared that the policy was made on the 9th of February, 1770, and there was no time fixed in it for the commencement or the duration of the voyage. The captain being called on the part of the plaintiffs, swore that he was five days before he cleared the land; and he proceeded on his direct voyage till the 14th of March, chasing, however, at different times, from the 7th to the 14th, when he began his cruise, *An insurance, with liberty to cruise six weeks, means six weeks successively from the commencement of the cruise.**

* On a policy of insurance with or without letter of marque, and liberty to chase, capture, and seize, the assured cannot delay on the voyage merely for the purpose of conveying the prize into a port of condemnation; *Lawrence v. Sidebotham*, 2 Smith, 214; S. C. 6 East, 45.

giving notice thereof to the crew, and ordering a minute of it to be entered in the log-book, which was done. From the 14th of March, he continued cruising about the same latitude (43°) till the 17th or 18th of April, when he discontinued the cruise, of which he also gave notice, intending to go to the Burlings, off Lisbon, in the course of his voyage. On the 23rd, he renewed the cruise, of which he gave notice as before, and ordered a minute to that purpose to be entered in the log-book. From that time, he continued cruising till the 28th of April, when he was taken by an American privateer. Two or three days before he sailed, he met with Kenyon, the broker, who got the policy subscribed, in the counting-house of the plaintiffs, who, in discoursing about his liberty to cruise, said he might do so in any latitude he chose; and that if he had no success in one place, he might leave it and proceed to another, and there begin cruising again, mentioning when he should begin and leave off in his log-book; and that if such separate times of cruising should not, when added together, exceed the space of six weeks, the terms of the insurance would be complied with.

[231] None of the underwriters were present at this conversation; but the captain said he considered Kenyon as acting for them as well as for the insured. His log-book was taken, but he produced a journal, which he and his clerk had copied from the log-book. He said, he understood the meaning of "cruising" to be delaying the course of the voyage in any particular latitude. The second witness produced by the plaintiffs had been captain of a letter of marque in the last war. He defined "cruising," a delay of the voyage under a fair wind to the port of destination. He had examined the journal, and was of opinion that there had been no delay in the voyage, except at the times which the captain had expressly appropriated to the cruise. It is the custom for letters of marque which have not liberty to cruise, to chase when they fall in with an enemy's ship. He was never cautioned against it, and had chased frequently under such circumstances. In like manner, without such liberty to cruise, it is customary and permitted to letters of marque, to go three or four points out of the direct course, for the purpose of speaking ships, and he did not consider any of the acts done by the captain before the 10th of March as cruising. The defendant's counsel read several entries from the journals, to show different instances of chasing, and quitting the direct course to speak ships, between the 7th and 14th of March. They then called a witness, who also commanded a letter of marque during the last war, and who swore that he thought the ship, by what appeared from those entries, was to be considered as cruising between the 7th and 14th. The counsel for the defendant called several other persons, two of whom were brokers. These witnesses concurred in thinking that, by the terms of the policy, the cruise must go on six successive weeks, not interruptedly and at intervals. The two witnesses examined on the other side thought, on the contrary, that they did not impose any such restriction; but they admitted, both on the one side and the other, that they only spoke their opinion, and could say nothing of any usage, none of them having even known a case circumstanced like the present. The defendant, upon the above evidence, set up a twofold defence: 1st. If the cruise was to be considered as having been continued from the 7th, instead of from the 14th, of March, to the 17th or 18th of April, the ship had cruised above six weeks, at different intervals, and consequently the terms of the policy had been departed from. 2ndly. If the jury should not be of that opinion, still from the words of the policy, as well as the nature of the thing, the six weeks were meant to be successive and uninterrupted, and therefore expired at the end of six weeks, computed from the 14th of March.

Per Cur. This was merely a question of construction, see 6 East, 51. on the force of the policy, and unless an usage could have been shown in favour of this desultory cruising, 6 East, 202. calling witnesses to support it, was calling them to swear to mere opinion. None of those produced knew of any instance, and therefore their evidence ought not to have been received; yet we dare say their testimony had great weight with the jury. The meaning of

words depends on the subject; the instructions were not read, but they show the meaning very clearly, for they run thus: "To cruise six weeks, and then proceed to Antigua. There can be no general rule here. The subject matter, in my opinion, is decisive to show that the six weeks meant one continued period of time. "A cruise" is a well known expression for a connected portion of time; there are frequently articles for a month's cruise, a six-weeks' cruise, &c. Such a liberty, as in this case, to a letter of marque, is an excuse for a deviation. But what is contended for by the plaintiff is impossible in practice. Suppose the ship returns directly back, after cruising for the space of a week; she may take, perhaps, three weeks to return to where she had been. Can she then renew the cruise and return again, and so repeatedly? The voyage, in that way, might last for years. But the true meaning is, "I will excuse a deviation for six weeks." The instructions, although it happens that they were not read, strike us much. Another argument; six weeks is a continuation, a congregate denomination of time. If they had meant separate days, they would have said forty-four days.—Therefore, the rule may be made absolute. [232]

4. JOLLEY v. WALKER. E. T. 1781. K. B. 2 Park, Ins. 396.

This was an insurance on goods and the ship Mary, from London to Cork and the West Indies; and the ship was warranted to proceed on that voyage with sixty men, and equipped with twenty-two guns, eighteen and six-pound shot, and sheathed with copper. The question was, whether a ship having letters of marque could chase an enemy's ship without being said to have deviated? The facts were, that the ship sailed with letters of marque on board against the French, Spaniards, and Americans, and was ordered not to cruise, but to proceed direct on her voyage to the West Indies; but in the event of her meeting or coming within sight of any ship belonging to the enemy, she was to chase, take, and make prize of such enemy's ship, if in her power. On the 26th of December, 1780, in lat. 14° 22' N. and long. 40° 52' W. at midnight, a sail was discovered, whereupon the Mary gave chase; and on such vessel's perceiving the Mary, she hauled up after her, and at one o'clock lost sight of her; but the Mary still stood to the northward, and at five a. m. saw such vessel again on the lee-bow two miles off. The chase was renewed, and at six a. m. the Mary came up within three quarters of a mile of the vessel, when she hoisted Spanish colours, and at half-past seven the Mary came up within pistol-shot, and began to engage, which engagement continued till ten o'clock, when the Spanish vessel sheered off, leaving the Mary much disabled. She afterwards steered her course to the westward, and was taken on the 5th of January, 1781, by an American privateer. It was agreed on all hands, that a ship, in such circumstances, might not cruise; and several witnesses spoke to the usage and practice of ships which carried letters of marque chasing an enemy. It was admitted, on the part of the insurers, that if an enemy came in the way, the ship must defend or engage; but contended, that if the letter of marque lost sight of the enemy, that was no longer chasing, but cruising. Lord Mansfield left it upon evidence to the jury, who found for the plaintiff.

(N) RELATIVE TO THE RISKS AND PERILS INSURED AGAINST, AND WHAT CONSTITUTES A LOSS WITHIN THE MEANING OF THE DIFFERENT RISKS INCLUDED IN THE POLICY.*

(a) By perils of the sea.

(1) What constitutes such a loss.

1. HODGSON v. MALCOLM. M. T. 1806. C. P. 2 N. R. 236.

This was an action on a policy of insurance in the usual form upon the ship Dolly, at and from Plymouth to Sunderland. In the first count of the declaration it was averred, that the Dolly, during her abode at Plymouth, was, by the perils of the sea, and by force and violence of the winds and waves, greatly damaged. [233]

* Losses by perils of the sea are those which happen from the sea, and are necessarily incidental to a ship engaged in a sea voyage, whether usual or extraordinary, whether foreseen or unforeseen.

is covered by the policy, though that peril was induced by a foreign cause;

ly broken, shattered, strained, damaged, stranded, and wholly lost. In the second count it was averred, that the said ship, during her abode at Plymouth, by the perils of the seas and strong tempestuous weather, and the force and violence of the winds and waves, ran aground, and was greatly broken, shattered, strained, damaged, stranded, and wholly lost.

Per Cur. The underwriters are liable, unless they can impute negligence to those who had the law and management of the ship. Now, in this case, no blame rests with them, for they could not resist the force of the press-gang. They were about to do all that was right to be done, but were prevented by an irresistible force. Indeed, the press-gang is not the necessary cause of the loss; for supposing all the hands to be taken out of the ship at sea, still the ship might be picked up and saved; any act of that kind, therefore, is not the inevitable cause of the loss.

2. WALKER v. MAITLAND. M. T. 1821. K. B. 5 B. & A. 171.

So, if a loss accrues immediately from a peril of the sea, but remotely from the negligence of the master and mariners.

The subject of this insurance was on boats belonging to the ship *Britannia*, and on produce in the said boats, or in any other craft employed in loading the ship during her stay at St. Kitts.

Per Cur. No doubt the owner under this policy expected to be indemnified against the loss in question. These words of the policy are very large; and although it may appear extraordinary that the underwriters should undertake to indemnify the assured against the negligence of the master and crew, which is a species of misconduct on their part, yet it is clear that they do so in the case of barratry, which is the highest species of misconduct of which the master and crew can be guilty. In this case the immediate cause of the loss was the violence of the winds and waves. No decision can be cited, where, in such a case, the underwriters have been held to be excused, in consequence of the loss having been remotely occasioned by the negligence of the crew. We are afraid of laying down any such rule: it will introduce an infinite number of questions, as to the quantum of care which, if used, might have prevented the loss. Suppose, for instance, the master was to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy; in that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and the underwriters were not liable. These and a variety of other such questions would be introduced, in case our opinion were in favour of the underwriters. We cannot distinguish this case from that of *Bush v. The Royal Exchange Assurance Company*; there the immediate cause of the loss was fire, produced by the negligence of one of the crew; yet the underwriters were held to be liable; here the winds and waves caused the loss; but they would not have produced that effect, unless there had been neglect on the part of the crew. We think that the underwriters are liable for the loss that has arisen in this case.

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In case of an insurance on living creatures, a loss accruing from failure of proper nourishment resulting from a delay occasioned by foul weather, is a loss by natural death, and not perils of the sea.

3. FATHAM v. HODGSONS. E. T. 1796. K. B. 6 T. R. 656.

The cargo consisted chiefly of slaves; and the plaintiff declared, that the ship with her cargo, after her departure from the coast of Africa upon the voyage insured, and before her arrival at any of her ports of destination, &c. was, by tempestuous weather, and through the mere perils and dangers of the sea, greatly retarded and delayed in her said voyage, by reason whereof, and from a failure and want of proper and sufficient food and sustenance for the said slaves, occasioned by the said ship being in her said voyage so delayed as aforesaid, divers of the said slaves became distempered and died; and that afterwards in the course of the voyage the ship was lost, with the residue of the slaves and the rest of the cargo. It appeared in evidence that the voyage was from the river Cameron, on the coast of Africa, to Grenada; that while she was at Belhay, on the coast, there was a great swell, by reason of which the ship struck several times on the ground, and was nearly wrecked; from thenceforth she became leaky, her rudder was rendered almost useless, and the vessel was unmanageable. The cargo of slaves was reduced in the course of the voyage from 168 to 40 by hardships in the delay of the voyage, by reason of

which the slaves were obliged to be fed with Indian corn, which was an improper food for them. All possible care had been taken to provision the ship, as well with European provisions as with such as the coast furnished for the use of the slaves. But instead of the ordinary voyage, which is from six to nine weeks, they did not arrive at Barbadoes till after a voyage of six months and eight days; and the captain put into Barbadoes instead of going on to Grenada, which would have been a sail of thirty-six hours longer, by the advice of his officers and crew, for the preservation of the surviving slaves, who were in a perilous condition. Mr. J. Heath, before whom this cause was tried was of opinion that the plaintiff was barred by the late statutes from recovering the value of slaves, they having died natural deaths; but he reserved that point for the consideration of this Court.

Per Cur. The act prohibits the owners recovering on account of the mortality of slaves by natural death; but it is argued, that if a captain will take a number of slaves disproportioned to the quantity of provisions on board, in consequence of which they die, the owners shall, notwithstanding, recover; that would repeal the act of parliament, which meant that every person going on this voyage should find his interest combined with his duty, and that he should take all possible care that the slaves should be well fed. A captain who knows the possible length of the voyage does not discharge his duty if he take an insufficient quantity of provisions. I am clearly of opinion that the plaintiff cannot call on the underwriters to make good this part of the loss.

4. *LAWRENCE v. ABERDEIN.* M. T. 1822. K. B. 5 B. & A. 107.

The policy was effected on the 30th of December, 1819. The voyage insured was at and from Cork to Barbadoes and St. Vincent's; and at the foot of the policy the insurance was declared to be on thirty mules, ten asses, and thirty oxen, warranted free of mortality and jettison. On the 17th of January, 1820, the ship sailed with the animals insured properly stowed on board, on free from the voyage insured. On the 19th of the same month a violent storm arose, which caused the ship to labour and pitch; this lasted without intermission until the 30th of the same month, when, for the preservation of the ship and cargo, and on account of the damage which the ship had sustained from the violence of the storm, the ship put into Mount's Bay, in Cornwall, in order to refit. On the first day of the storm, from the violent pitching and rolling of the ship, occasioned by the storm and consequent agitation of the sea, ten of the mules, one of the oxen, and five of the asses were killed; the remainder of the animals, from the same causes and perils of the sea, on that and the following days until the 30th of January, received such violent and severe bruises, lacerations, and injuries, that all of them died in consequence thereof, before the ship sailed again in prosecution of her voyage from Mount's Bay, which she did on the 14th of February, 1820, excepting six mules and one ass, one of which six mules afterwards died from the same cause before the arrival of the ship at St. Vincent's. The ship arrived at St. Vincent's, with the remaining five mules and one ass on the 24th of March, and delivered the rest of her cargo in safety. The question for the opinion of the Court was, whether the plaintiff was entitled to recover for the loss of all, or any, and which of the animals insured.

Per Cur. Although death may have been the immediate cause of the loss, and may have made the actual loss to the assured greater than it otherwise would have been; still, as the injury to the animals which occasioned their death was caused directly by the violence of the storm, we are of opinion that this is to be considered as a loss by the perils of the sea; it consequently falls within the risks enumerated in the policy, and it seems to us that it is not excepted out of those perils by the words warranted free from mortality and jettison. Independently of those words, the underwriters would undoubtedly have

* So, in the case of a policy on horses, when some of the animals, in consequence of the agitation of the ship in a storm, broke down the partitions by which they were separated, and, by their kicking, bruised and wounded each other so much that they all died, it was held, upon a special verdict, that this was a loss by perils of the sea; *Gabay v. Lloyd*, 3 B. & C. 793.

But a policy on living animals warranted free from mortality and jettison, covers losses occasioned by the agitation of the ship in a storm.*

been liable as for a loss arising from a peril of the sea. Those words were the language of the underwriters, and were introduced by them to protect themselves from a particular species of loss. By the terms of the policy, they insured against the perils of the sea, &c. and all other losses and misfortunes that should come, to the hurt, detriment, and damage of the subject matter insured. Now the exception must be considered as ingrafted upon these general words in the policy, and the whole should be read together as one sentence and then it would stand thus:—"And the underwriters will be liable for losses by perils of the seas, and all other losses, except losses, by mortality and jettison." It seems to us that, as the injury which immediately preceded and caused the death of the animals proceeded directly from the violence of the storm, the loss is to be considered a loss by the perils of the sea: death may or may not have increased the amount of the actual loss to the assured. With respect to the mules and asses, the entire loss arose from the perils of the sea, and was neither increased nor diminished by their death; for, after receiving a mortal wound, they became of no value to the owner, and death consequently did not in any degree increase the loss. The case might be different with respect to the oxen; if they were killed after receiving an injury, their flesh might be of some value as food, and consequently their death may have increased the loss in some degree; but still, as the previous injury was occasioned by the perils of the sea, whether the death of the animals did or did not increase the amount of the actual injury to the owner, we are of opinion that it must be considered a loss by the perils of the sea. The circumstance of the parties having inserted in the exception the word jettison, satisfies us that they did not contemplate the case of violent death; for, although it is possible that the animals thrown overboard might, under favourable circumstances, reach the shore and survive, yet we think that the term usually denotes the throwing overboard in a storm, when there would be little probability of animals surviving, and that it must therefore mean a jettison, whence death ensues. Now if the term mortality were intended to protect the underwriter in every case of the animals meeting with a violent death, the introduction of the word jettison would be superfluous, as that species of loss would be covered by the word mortality. Besides, this absurd consequence would follow, if we were to give to the words used in the exception the construction contended for by the defendant, that, where the violence of the wind and waves was so great as to cause the death of the animals during the voyage, the underwriters would not be liable at all; but where the violence of the wind and waves was only such as to cause some injury to the animals short of death, then the underwriters would be responsible. For these reasons we are of opinion that the word mortality in this policy must be understood in its ordinary and popular sense, as importing its arising from natural and not from violent causes; and that being so, there must be judgment for the plaintiff.

5. THOMPSON v. WHITMORE. M. T. 1810. C. P. 3 Taunt 227.

A loss sustained by a ship bulging while hove down to repair, is not a loss by perils of the sea.

It was proved that the vessel, which was in the employ of government as a transport, and was a narrow-floored vessel of 244 tons burthen, had, under the direction of the officers of the transport board, been carefully laid down on Gosport Beach to be cleared and caulked, in a situation where equally narrow-floored, and also vessels of a much greater bulk, therefore much more liable to injury, even of the burthen of 800 tons, had usually been laid down with safety for the same purpose. The ship lay there easy on the first day, when the tide left her, but she was found on the following day full of water, which rose in her with the rising of the circumambient tide; and upon examination it appeared that the planks of her side on which she lay had given way, and that some of her foot-hooks were broken. It was objected, that this was not a loss occasioned by any perils of the sea; and cited a case of Rowcroft v. Dunsmore, B. R., tried in 1801, before Lord Kenyon, C. J., in which the ship was hove down, and while heaving down, she could not bear the strain; she was drawn on the land, where she bulged; and the question was made, whether, it being necessary to perform this operation on her, this damage was occasioned by a

peril of the sea? Lord Mansfield, C. J., thought, that although the tides knocked away the stores which supported the Collingwood, and thereby occasioned the mischief, and although the ship was in the service of the government at the time, and not under the control of the plaintiff, yet as the damage happened upon the land, it could not be considered as a loss sustained by the perils of the sea; and nonsuited the plaintiff, with liberty to move to enter a verdict with 81*l.* 4*s.* damages, if the Court should be of opinion that the plaintiff was, under the circumstances, entitled to recover.

6. *SMITH v. SCOTT*. M. T. 1811. C. P. 4 Taunt. 126. S. P. *BUTLER v. FISH*. ER. M. T. 1767. N. P. 3 Esp. 67.

Action upon a policy of insurance. The evidence was, that a ship, named *Where a the Margaret*, ran foul of the *Helena*, by the grossest neglect; for when, upon ship is run down by another, the shock being given, some of the *Helena's* crew went on board the *Margaret*, they found only one man on the deck, and he was asleep. Hereupon it was objected by the council for the defendant, that the occasion of the injury, not through design but negligence, was not the perils of the seas, but the gross negligence of the crew of the *Margaret*, and that this was a fatal variance from the loss averred. The jury, the loss is by the perils of the sea, however, found a verdict for the plaintiff, subject to this point, which the Chief Justice reserved.

Per Cur. We do not know how to make this out not to be a peril of the sea. What drove the *Margaret* against the *Helena*? the sea. What was the cause that the crew of the *Margaret* did not prevent her from running against the other? their gross culpable negligence; but still the sea did the mischief. It is reasonable enough that the plaintiffs should permit the defendant to use their names as plaintiffs against the owners or crew of the *Margaret*, so as to recover whatever the plaintiffs would be entitled to as against the *Margaret*, and to apply it in diminution of their loss; but it would lead to endless discussion, if it were required that no cause except the cause of loss alleged in the declaration should be conducive to the loss.

7. *POWELL v. GUDGEON*. M. T. 1816. K. B. 5 M. & S. 431. S. P. *SARGUY v. HOBSON*. T. T. 1822. K. B. 5 D. & R. 192. S. C. 2 B. & C. 7.

Action on a policy of insurance. The plaintiffs were merchants and owners of goods insured, which consisted of 153 hogsheads of sugar, 72 puncheons of rum, and 20 casks of coffee, and were loaded at Dominica. The loading was completed on the 22nd of July and the ship was about to sail 23rd, but on that morning a violent hurricane drove her from her moorings at the island, want of and did material damage to the ship and cargo. Part of the tackle was obliged [238] to be cut away and abandoned, and the ship was necessarily taken to the island of St. Thomas, where she arrived on the 27th of July. Both ship and cargo were so much damaged that it was necessary to discharge her cargo; upon doing which it was found that of sixty-five hogsheads, part of the sugar had been washed out, and the rest damaged. These sixty-five hogsheads were by the ship sold as damaged, and the loss arising upon them was covered by the money in a storm, paid into the court. The remainder of the goods were safely warehoused. The necessary repairs were done to the ship to enable her to proceed on her voyage; to defray the expences of which repairs, the master of the ship, not the underwriters are not liable for the value of the ing money, sold part of the cargo, and amongst other goods fifty-two hogsheads goods, of sugar, six casks of coffee, and the seventy-two puncheons of rum part of the goods belonging to the plaintiff, and applied the proceeds to defray these expences. The ship afterwards went to St. Croix, out of her course to Bristol, for the purpose of making good her freight, and did not finally sail on her return home until November, being warranted by the policy to sail on or before the 1st of August preceding, and was captured on her voyage home, and condemned by the French.

Per Cur. It does not appear to us that this was a loss by a peril of the sea, or such as entitles the assured to recover, under the general words of the policy; but a loss for which the owner of the goods will be entitled to be reimbursed by the owner of the ship. The owner of the ship undertakes to have the ship fit to perform her voyage; and in case of accident it is the duty of the

owner, and the master in the place of the owner, to provide for its repair. We consider it as a rule applicable to the construction of policies, that the Court must look to the immediate cause of loss, in order to ascertain whether it be a loss within the policy: The loss here was occasioned by the act of the captain, who disposed of the goods, in order to provide himself with funds for the repair of the ship. If he could have raised these funds in any other way he would not have taken the goods. To hold this a loss for which the underwriter is responsible would be to make his liability depend upon the accident of the captain's being unable to provide the funds for the repair, except by means of the goods. In the case of jettison the immediate cause of the loss is a peril of the sea. When the whole is like to be swallowed up by the sea, the law of jettison allows a part to be sacrificed to save the rest. Inasmuch, therefore, as we are bound, according to the common rule for the construction of policies, to look to the immediate cause of loss, and as this loss was not immediately caused by a peril of the sea, but by the inability of the captain to procure a fund for the repairs which he was bound to do, it seems to us that this was a loss within the policy.

8. CULLEN v. BUTLER. M. T. 1816. K. B. 5 M. & S. 461; S. C. 4 Campb. 289.

When a ship and goods are sunk at sea by an other ship firing upon her, mistaking her for an enemy, although this is not strictly a loss by perils of the sea, yet the underwriters are liable under a special count stating the particular circumstances

The plaintiff declared in the first count upon a loss by the perils and misfortunes of the seas; and in the second count he averred that the ship, with the goods on board, departed and set sail from London in prosecution of their intended voyage; and before her arrival at the Canary Islands, to wit, on the 7th of July, &c. in the night of that day, the master and crew of a certain British ship called the *Midas*, believing the ship in the policy mentioned to be an enemy's ship, and that the persons on board thereof were then and there in a hostile manner about to attack the *Midas*, and attempt to board and take her as a prize, did then and there, for the purpose of defending themselves and the *Midas* against such apprehended attack, but without any fault committed or done by the master or crew of ship in the policy mentioned, fire at and against, and strike and pierce with shot, the ship in the policy mentioned, whereby the said ship, with the goods on board, was sunk in the sea and lost.

Per Cur. As the Court are of opinion that the plaintiff is entitled to recover upon the second count of this declaration, formed upon the special circumstances of this case, which clearly seem to fall within the general and comprehensive words in the policy subjoined to the particular causes of loss therein specified, viz. "all other perils, losses, and misfortunes, which had or should come to the hurt, detriment, and damage of the said goods and merchandises, and ship, &c. or any part thereof," it becomes less material to consider whether the plaintiff would be entitled to recover as for a loss "by perils of the sea" in the proper and strict sense of the words, i. e. "*ex-marine tempestatis discrimine*," as described by Emerigon. With loss by perils of the sea is the specific loss stated in the first count. If it be a loss by perils of the sea merely, it is a loss happening upon the sea, as has been contended, all the other causes of loss specified in the policy are, upon that ground, equally entitled to be so considered; and it would be unnecessary, as to them, even to assign any other cause of loss than a loss by perils of the sea. But as that has not been the understanding and practice on the subject hitherto, and inasmuch as the very insertion of the general or sweeping words, as they are called in the policy after the special words, imports that the special words were not understood to include all perils happening on the sea, but that some more general words were required to be added, in order to extend the responsibility of the underwriters unequivocally to other risks not included within the proper scope of any of those enumerated perils, we shall think it necessary only to advert shortly to some of the reasons upon which we think that the general words thus inserted, comprehend a loss of this nature. The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance,

and may have the effect of extending a reasonable indemnity to cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend. It is no objection to the plaintiff's right to recover against the underwriters in this case, that he may have also a right to recover against the persons by whose immediate act the change was occasioned. That has been decided in the case of a damage at sea by collision. The only inconvenience which can be suggested as likely to arise from a limited construction of the words "perils of the seas," occurring in policies of assurance, and from the effect attributed to the general words, is, that in doubtful cases the plaintiff will feel it necessary to introduce a special count stating the particular circumstances by which the loss was occasioned, instead of relying upon a count framed upon the special head of loss in policy, viz. by perils of the sea, or the like. But this inconvenience will be well compensated to the assured by the advantage of certainty, by which the risk of nonsuit at the trial, and the expenses attendant thereupon, will be avoided.

9. *FLETCHER v. INGLIS*. H. T. 1819. K. B. 2 B. & A. 315.

The ship insured was a transport engaged in the service of government; it appeared that in the course of such service, and within the terms mentioned in the policy, she was ordered into Boulogne, where, under the direction of the superintendent of transports, she was moored near one of the quays. The harbour of Boulogne is a dry harbour, with a hard uneven bottom. Between nine and ten at night, the tide having then left the vessel, a cracking noise was heard in the ship, proceeding, as the witness believed, from something breaking. Some time after this, on the return of the tide, there was a considerable swell in the harbour, and the ship struck the ground hard several times; in the morning, eighteen of the knees were found to be broken. It was proved, that the ship had frequently struck in other soft harbours without receiving any damage, but at those times she was water-bound. This action was brought to recover the amount of the expense incurred by the assured in repairing this damage. The jury found a verdict for the plaintiff; and now the Court said, they would consider the case; and after an interval of a few days, stated that they had considered it, and that they thought it was a loss by a peril of the sea; accordingly the rule was refused.

10. *GREGSON v. GILBERT*. E. T. 1781. K. B. 1 Park. Ins. 83.

An action was brought upon a policy of insurance, for the value of certain slaves insured by that policy. The declaration stated that, by perils of the sea, contrary winds, currents, and other misfortunes, the voyage was so much retarded that a sufficient quantity of water did not remain for the support of the slaves and other people on board, and that certain of the slaves mentioned in the declaration perished for want of water. The facts appearing in evidence were, that the ship being bound from Guinea to Jamaica, had missed the island, and the crew were reduced to great distress for want of water; that the captain consulted with the crew, and it was unanimously agreed upon, that some of the slaves should be thrown overboard, in order to preserve the rest; that at the time this resolution was formed there remained but one day's full allowance of water at two quarts per man. The jury, upon this evidence, found a verdict for the plaintiff, with damages at 30*l.* a head for every slave thrown overboard. A motion was afterwards made for a new trial, upon the ground that this was not a loss by perils of the sea.

Lord Mansfield. This is a very uncommon case, and deserves a further consideration. There is great weight in the objection that the loss is stated by the declaration to have arisen from the perils of the sea and the currents, &c. had made the ship foul and leaky. Now does it appear by evidence that the

* So, in the case of a policy on goods warranted free from capture and seizure, when the ship was stranded on a shoal within a few miles from the port of destination, disabled from proceeding, and lost; but while she lay on the sand she was seized by the commander of the place at which she was stranded, and the goods were confiscated by him, this was holden a loss by perils of the sea; see 2 Bing. 205; 1 Holt, 149.

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When a vessel was insured for twelve months, during which she was placed in a dry harbour, the bed of which was hard and uneven, and on the tide having left her she received damage by taking the ground; held, that this was a loss by a peril of the sea.*

The throwing overboard of slaves in consequence of a scarcity of water arising from the captain having missed the island of Jamaica, and being longer than the ordinary passage, held not to be a loss by the perils of the sea.

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ship was fowl and leaky? On the contrary, the loss happened by mistaking Jamaica for another place. Besides, a fact has been mentioned by the counsel of throwing some overboard after the rain fell, a fact which is not agreed on both sides, though a very material one.

Mr. Justice Buller. The declaration does not in any part of it state the loss which has been the occasion of this demand, and it would be very mischievous if we were to overturn this objection. Suppose for a moment that the underwriters in some cases are liable for the mistake of the captain, yet, if they are not liable in others, the nature of the loss must be stated in the declaration, that the defendant may have an opportunity of moving in arrest of judgment if it be not sufficiently alleged. But it would be impossible for the defendant in this case to move in arrest of judgment; for the facts of the case as proved are different from those stated in the declaration. The point of law in arrest of judgment can only be argued from the facts stated on record, and the declaration in this case states the loss of the plaintiff to have happened by perils of the sea. The rule for a new trial must be made absolute on payment of costs.

11. PHILLIPS v. BARBER. M. T. 1821. K. B. 5 B. & A. 161.

Where a ship was placed in a graving dock containing two or three feet of water, to be repaired, and whilst there, by the violence of the wind and weather, was thrown over on her side and was bulged, this was held not to be a loss by perils of the sea.

So where a ship, during the voyage, was eaten by the worms, and rendered incapable of proceeding

[242] on her voyage, and is condemned, that is not a loss by perils of the sea within the meaning of the policy. The underwriter is liable for a robbery of the goods insured, when committed by thieves from without.

In an action on a policy of insurance on a ship, in the usual form, for twelve months, at sea and in port, the loss averred was as follows: that the ship having arrived at the harbour of St. J. and discharged her cargo, it became necessary to place her, and she was accordingly placed in a graving-dock, there to be repaired, and near to a certain wharf in the graving-dock; and that whilst she was there, by the violence of the wind and weather, she was thrown over on her side, whereby she struck the ground with great violence, and was bulged, &c. *Per Cur.* In this case the plaintiff has not entangled himself by any particular allegation, but has shown fully the manner, time, and place of the loss. This, it is to be observed, was a policy upon the ship for time, at sea and in port. Now the loss stated in the declaration was, that after the ship had discharged her cargo at the harbour of St. John, she was then and there placed in a certain graving-dock, for the purpose of repair, near to a certain wharf, and that whilst she was lying there she was, by the violence of the wind and weather, blown over on her side and damaged, so that it became necessary to sell her. Now we think that it is clearly alleged that this was a loss happening in port; and then the question will be, whether it is a loss falling within any of the perils insured against? Now the perils insured against are of the seas, men of war, fire, &c., and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship. These general words are, indeed, restrained in construction to perils *ejusdem generis*, with those more particularly enumerated in the policy. In this case, however, the loss was occasioned by the violence of the wind and weather in port; and it seems to us, therefore, to have been produced by a peril *ejusdem generis* with those specified, and to fall within the general words of the policy. There must, therefore, be judgment for the plaintiff.—Judgment for the plaintiff.

12. ROHL v. PARR. H. T. 1796. K. B. 1 Park, Ins. 85; S. C. 1 Esp. 445.

In an action on a policy of Insurance at and from St. Bartholomew to the coast of Africa, and during her stay and trade there, and back to St. Bartholomew, it was attempted under a count for a loss by perils of the sea, to recover for a total loss of the ship, which appeared to have been destroyed by a species of worms which infest the rivers of Africa. An intelligent merchant swore that he had known many instances of this species of loss, but that the underwriters had invariably refused to pay.

Lord Kenyon, upon this evidence, and the unanimous declaration of the jury, decided that it was not a loss by the perils of the sea.

13. HARFORD v. MAYNARD. H. T. 1785. 1 Park, Ins. 31.

Per Lord Mansfield. That an underwriter is liable for a robbery of the goods insured, when committed by thieves from without, cannot be doubted, as thieves are a peril expressly insured against by the policy.

2. When such a loss is presumed.

1. *NEWBY v. HEAD*. M. T. 1783. K. B. 1 Park, Ins. 85.

The Court said in a modern case before Lord Mansfield, which was an action of covenant on a deed, in the nature of a policy of insurance, by which the defendant was bound to insure against any loss happening before the 30th of November, 1762, free from average, the ship sailed from Newcastle to Copenhagen, which is usually about ten days' voyage. She was soon after taken by a French privateer, but ransomed; and she then proceeded on her voyage to Copenhagen (as was proved by the ransomers) in a bad condition. She was never heard of afterwards, though all due diligence had been used, and several ships which sailed after her were proved to have arrived safe at Copenhagen. The Court there held it must be presumed she was lost by foundering.

A ship which is missing, and of which no intelligence has been received within a reasonable time after sailing, shall be presumed

2 *COHEN v. HINCKLEY*. H. T. 1800. N. P. 2 Campb. 51; S. C. 1 Taunt.

Action on a policy of insurance on the ship *Union*, at and from Portsmouth to Quebec. The declaration stated, that after the ship set sail from Portsmouth, and before her arrival at Quebec, she was wholly lost by the perils of the sea. As the plaintiff's case was at first shaped, the only evidence of the loss was given by the plaintiff's son, who swore that on the 8th or 9th of May, 1806, he saw the *Union* at Portsmouth, in Stoke's Bay, going out with other ships for Spithead, and that she had never afterwards been heard of. It was contended that it was the best evidence the nature of the case admitted of, and that the presumption from the facts proved was, that the ship perished on the voyage to Quebec, and that the policy being "at and from Portsmouth," the loss was covered by it, even supposing that the ship sunk while she lay there.

Lord Ellenborough. Even in that case, you must have shown she was at Portsmouth, on the voyage insured; but the declaration states, that the loss happened after the ship sailed from Portsmouth to Quebec. Now you must give some evidence that she sailed from the one place to the other; but when she left Stoke's Bay, how do I know that she was not bound to the East Indies? If you could show that she had a particular destination by charter-party, I should presume that she sailed on the chartered voyage; or if you could show that she was cleared out for a particular port, I should presume that she set sail for it when she drifted from her moorings. But you have laid no foundation for any presumption upon this subject, either one way or another. The convoy bond was put in, which had been executed at the custom-house, by the plaintiff as owner, and Christopher Rowlands, as captain of the *Union*, on the 28th of April, 1806. In the body of this instrument no mention whatever is made of the place to which the ship was bound, the parties merely engaging that she should not sail without, nor depart from, convoy without leave; but at the bottom of it these words were written, "Convoy bond for Quebec." An officer from the customs stated that it was according to the course of office to write these words upon the bond; and that, though he did not personally know of any act of office being done upon it, he had no doubt that a certificate and other papers for a voyage to Quebec were delivered to the captain before he sailed.

3. *TWENLOW v. OSWIN*. H. T. 1809. N. P. 2 Campb. 85.

The ship sailed from Liverpool on the 14th of April, 1807. On the 23d of Bat is July following, the plaintiffs, who reside at Liverpool, received a letter from their correspondent at Miramichi, dated June 11, stating that the ship had not then arrived, but was expected in a few days. The policy was effected on the 4th of August, when this letter was shown to the underwriters. In addition to these facts, the plaintiffs proved that they were the owners of the ship, and called one of their clerks, who swore she had not been heard of since. It was contended that the plaintiffs must be nonsuited, unless they gave some further evidence of the loss of the ship. Sir J. Mansfield, C. J., held that this was

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to be lost by foundering at sea.
In such cases, the onus lies upon the plaintiff of proving that when the vessel left the port of outfit she was bound upon the voyage insured. The good *prima facie* evidence for the purpose.

* There is, however, no fixed rule of law after which a missing ship shall be reputed to be lost. It is in cases a question of presumption, to be governed by the circumstances of the particular case: see *Houstan v. Thoraton*, Holt, 242. S. P. *Marshall v. Parker*, 2 Campb. 78.

prove that she was not heard of in his country after she sailed, without calling witness as from her port of destination to show that she never arrived there.*

evidence to go to the jury of a loss, as laid in the declaration; and the plaintiffs had a verdict.

(b) *Loss by capture.*†

1. *Goss v. WITHERS.* H. T. 1781. K. B. 2 Burr. 694. S. P. *HAMILTON v. MENDY.* M. T. 1788. K. B. id. 1209.

* This was a special case from the sittings in London, upon two actions, on

† When it is said that a ship has not been heard of, it is generally understood to mean that no intelligence has been had from persons capable of giving an authentic account; see 6 B. & C. 19.

† Capture is where a ship is taken by an enemy in war, or by way of reprisals, or by a pirate; every capture, whether lawful or unlawful, is in general within the meaning of the policy. To constitute a loss by capture within the meaning of the policy, it is not necessary that the ship should be condemned or carried into port or fleet of the enemy, 2 Burr. 694; see 4 East, 396, 402; 7 East, 449; 9 East, 233; 11 East, 205; 1 M. & S. 52. A ship is driven by a storm near the enemy's coast, and is there captured; this is a loss by capture, and not by the perils of the seas; see Peake, 212 2 N. R. 336. A vessel barratrously given up to the enemy is a loss by capture; see 2 Campb. 620; 3 Taunt. 508. A warrant against a capture in ports does not extend to a capture in a place within the headlands of a river, but not within the limits of any port; see 2 Campb. 541; but if the place be the point at which vessels on the particular voyage usually unload, it is within the warranty; 2 Campb. 616; 13 East, 394. Formerly it was a common practice, when vessels were captured by the King's enemies, or by other persons committing acts of hostility, for persons to agree with the captors for ransom of the vessels; and for securing the stipulated ransom, not only to give hostages, but also to bind themselves or the owners for the payment thereof. The law of nations gave a sanction to this practice; but it having been found by experience liable to great abuse, and there being reason to apprehend that upon the whole it operated more to the disadvantage than benefit of his Majesty's subjects, it was enacted by stat. 22 Geo. 3. c. 25. s. 1. "that it should not be lawful for any of his Majesty's subjects to ransom or enter into any agreement for ransoming any vessel belonging to any of his Majesty's subjects, or any goods on board the same, which should be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his Majesty's subjects;" by s. 2. "agreements entered into, and bills, notes, and other securities given by any persons for ransom of such ship, or of any goods on board the same, are declared void;" and by s. 3. "a penalty of 500*l.* is given to the informer for every offence against this act." This statute having expired with the termination of hostilities in 1783, the same provisions have been repealed *literatim* in subsequent prize acts; see stat. 45 Geo. 3. c. 72. s. 16, 17, 18. By stat. 45 Geo. 3. c. 72. s. 7. which expired at the termination of the war, it was enacted, "that if any ship, vessel, or boat, taken as prize, or any goods therein, shall appear and be proved in a competent court of admiralty to have belonged to any of his Majesty's subjects, which were before taken by any of his Majesty's enemies, and at any times afterwards retaken by any of his Majesty's ships of war, privateer, or any other vessel or boat under his Majesty's protection, such ship, &c. shall, except those hereafter excepted, be adjudged to be restored by decree of the said court of admiralty to the former owners, on their paying for and in lieu of salvage; 1st. If retaken by any of his Majesty's ships or hired armed ships, one-eighth part of the true value of the ship, &c. 2nd. If retaken by any privateer or other ship, &c. one-sixth part of the true value of, &c. And 3rd. If retaken by the joint operation of one or more of his Majesty's ships, and one or more private ships, such salvage as the Judge of the High Court of Admiralty, or other court having cognizance thereof, shall under the circumstances of the case deem fit, unless the vessel retaken appears to have been, after the taking by his Majesty's enemies, by them set forth as a vessel of war, in which case it shall not be restored to the former owners, but shall (whether taken by his Majesty's ships or by a privateer) be adjudged lawful prize, for the benefit of the captors;" and so by s. 19. and 20. it is enacted, "that vessels or goods, taken or retaken, and restored by the commander, &c. of the privateer, &c. through consent or clandestinely, or by collusion or connivance of such commander, &c. without being brought to adjudication, shall, upon proof thereof in a court of admiralty, be adjudged good prize to the King, and a penalty is imposed on such commander; provided that if a ship be retaken before she has been carried into an enemy's port, it shall be lawful for her, if the recaptors consent thereto, to prosecute her voyage, and it shall not be necessary for the recaptors to proceed to adjudication till six months, or till the return of the ship to the port from which she sailed; and the master, owners, or their agents may, with the consent of the recaptors, deliver and dispose of their cargoes before adjudication; and in case the vessel shall not return directly to the port whence she sailed, or the recaptors shall have had no opportunity of proceeding regularly to adjudication within six months, on account of the absence of the vessel, the Court of Admiralty shall, at the instance of the recaptors, decree the restitution, on the former owners paying salvage, upon such evidence as shall appear reasonable, the expense of such proceeding not to exceed the sum of fourteen pounds." Provisions of similar import as these are usually made at the commencement of every fresh war.

two distinct policies of insurance, one upon a ship, and the other upon the If the ship loading. The former was an insurance on the David and Rebecca, at and [245] from Newfoundland, to her port of discharge in Portugal or Spain, without the and goods Streights, or England, to commence from the time of her beginning to load at are lost by Newfoundland for either of the above-named places, and to continue till she the capture, should be arrived at her said port of discharge, and there moored 24 hours at although they are anchor in safety. The ship was by agreement to be valued at the sum sub- never con- scribed, without further account; the insurance was to be at ten guineas per demned at cent. and in case of loss to abate two per cent.; and in case of average loss, all, nor not exceeding five per cent. to allow nothing towards such loss; and if the ves- carried into sel was discharged without the Streights, excepting the Bay of Biscay, two any port of the enemy, guineas per cent. were to be returned; and if she sailed with convoy and arri- it is a loss ved, two guineas more per cent. were to be returned. The plaintiffs declared within the upon a total loss, by capture by the French. The policy declared upon in policy. the other action was an insurance upon any kind of lawful goods and merchandizes, laden or to be laden on board the aforesaid ship; and this policy for 7l. 7s. insured 70l. The declaration alleged; that divers quantities of fish and other lawful merchandizes, to the value of the money insured, were put on board to be carried from Newfoundland to her port of destination, and so continued (except such as were thrown overboard, as is hereafter mentioned) till the loss of the ship and goods. The declaration then avers, that a part of the said goods were necessarily thrown overboard in a storm, to preserve the ship and the rest of the cargo; after which jettison the ship and the remainder of the goods were taken by the French. The case states, that the ship departed from her proper port, and was taken by the French on the 23d of December, 1756; and that the master, mates, and all the sailors, except an apprentice and landsmen, were taken out and carried to France; that the ship remained in the hands of the enemy eight days, and was then retaken by a British privateer, and brought in on the 18th of January to Milford Haven, and that immediate notice was given by the insured to the insurer, with an offer to abandon the ship to their care. It was also proved at the trial, that before the taking by the enemy a violent storm arose at sea, which first separated the ship from her convoy, and afterwards disabled her so far as to render her incapable of proceeding on her destined voyage, without going into port to refit. It was also proved, that part of the cargo was thrown overboard in the storm, and the rest of it was spoiled while the ship lay at Milford Haven, after the offer to abandon, and before she could be refitted; and the insured proved their interest in the ship and cargo to the value insured. Several questions arose upon the trial of the first of these causes; it was agreed that the jury should bring in their verdict in both cases for the plaintiffs, as for a total loss; subject however to the opinion of the Court on the following questions, viz. 1st. Whether this capture of the ship by the enemy was or was not such a loss, as that the insurers became liable thereby. 2ndly. Whether, under the several circumstances of this case, the insured had or had not a right to abandon the ship to the insurers, after she was carried into Milford Haven? After two arguments, the Court decided unanimously in favour of the plaintiffs; and, in the opinion then delivered by Lord Mansfield, all the law upon this subject was fully discussed. It will not be necessary, however, to state in this place what fell from his lordship upon the first of these questions, thus submitted to the opinion of the Court. As to the question, whether property was or was not transferred to the enemy by a capture, and absolutely lost to the original owner, it could no way affect the contract entered into between an insurer and the insured. It will be sufficient then to follow his lordship in the second part of his argument.

Lord Mansfield. The single question, therefore, upon which this case turns is, whether the insured had, under all the circumstances, an election to abandon on the 18th of January, 1757? The loss and disability were in their nature total at the time they happened. During eight days the plaintiff was certainly entitled to be paid by the insurer as for a total loss; and in case of a recapture the insurer would have stood in his place. The subsequent recapture

is at best a saving of a small part; half the value must be paid for salvage.—The disability to pursue the voyage still continued; the master and mariners were prisoners; the charter-party was dissolved; the freight (except in proportion to the goods saved) was lost; the ship was necessarily brought into an English port; what could be saved might not be worth the expense necessarily attending it, which is proved by the plaintiff's offer to abandon. The subsequent title to restitution, arising from the recapture, at a great expense, the ship too being disabled from pursuing her voyage, cannot take away a right in the insured at the time of the capture; but, because he cannot recover more than he has suffered, he must abandon what may be saved. I cannot find a single book, ancient or modern, which does not say that, in case of a ship being taken, the insured may demand as for a loss, and abandon. What proves the proposition most strongly is, that by the general law he may abandon in the case merely of an arrest, or an embargo, by a prince not an enemy. Positive regulations in different countries have fixed a precise time before the insured should be at liberty to abandon in that case. The fixing a precise time proves the general principle. Every argument holds stronger in the case of the other policy with regard to the goods. The cargo was in its nature perishable, destined from Newfoundland to Spain or Portugal; and the voyage was as absolutely defeated as if the ship had been wrecked, and a third or a fourth of the goods saved.

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2. JUSTADO. V. ROGERS. T. T. 1802. C. P. 3 B. & P. 191.

An insurance effected in Great Britain on a French ship previous to the commencement of hostilities between this country and France, does not cover a loss by British capture.*

The plaintiff was owner of the ship at the time of the insurance, and from thence until the time of the loss hereinafter mentioned. The ship sailed upon the voyage insured in October, 1792, and arrived at Martinique in November following; she remained there until March, 1794; but her remaining there was justified by necessity; and war having broken out between this kingdom and France, she was then, upon the capture of the island of Martinique by the British forces, taken by them as a prize with four other French vessels. The plaintiff at the time the policy was effected, and from thence until the action was commenced, was a French subject, and resident at Bayonne, in France, which country was in amity with Great Britain when the policy was effected, and until the month of February, 1793, at which time hostilities commenced between England and France. On the 10th of March, 1796, his Majesty granted a licence to Messrs. Alves, Rebello, and Co., authorizing them to receive from the underwriters on this policy the money for which they subscribed; and this action was brought under directions from Messrs. Alves, Rebello, and Co., the plaintiff's agents. The question for the opinion of the Court was, whether the plaintiff was entitled to recover in this action? If the Court should be of opinion that he was, a verdict was to be entered for the plaintiff; and if the Court should think that the objection to the plaintiff's recovery appeared upon the declaration, so as to entitle the defendant to the full benefit of it upon a motion in arrest of judgment, the verdict was to be entered for the plaintiff, and the defendant was to make such application; but if the Court should be of opinion, that the plaintiff was not entitled to recover, and that the objection did not appear upon the record so as to entitle the defendant to such benefit, then a nonsuit was to be entered.

Per Cur. By the terms of the policy the underwriters certainly undertake to indemnify the plaintiff against all captures and detentions of prizes, without any exception in respect of the acts of the government of their own nation. The question then is, whether the law does not make that exception, and whether it be competent to an English underwriter to indemnify persons who may be engaged in war, with his own sovereign against the consequences of that war? We are all of opinion, that, on the principles of English law, it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of his own country, and that such a contract is as much prohibited as if it had been expressly forbidden by act of parliament.

* If a ship be driven by stress of weather on an enemy's coast and there captured, it is a loss by capture, and not by perils of the sea; see *Green v. Elmalié, Peake*, 212.

it is admitted, that if a man contract to do a thing which is afterwards prohibited by act of parliament, he is not bound by his contract. This was expressly laid down in *Brewster v. Kitchell*, 1 Salk. 198. And on the same principle, where hostilities commenced between the country of the underwriter and the assured, the former is forbidden to fulfil his contract. With respect to the expediency of these insurances, it seems only necessary to cite a single line from *Bynkershock*, and part of a passage in *Valin*; see *Marshall*, 32. The former says, "*Hostium pericula in se suscipere quid est aliud quam eorum commercia maritima promovere*;" and the latter, speaking of the conduct of the English, during the war of 1756, who permitted these insurances, says, "The consequence was, that one part of that nation restored to us by the effect of insurances what the other took from us by the rights of war." Lord Hardwicke, indeed, in *Henckle v. The Royal Exchange Assurance Company*, 1 Ves. 320. uses these words: "No determination has been, that insurance on enemies' ships during the war is unlawful." It might be going too far to say, that all trading with enemies is unlawful; for that general doctrine would go a great way even where only English goods are exported and none of the enemies' imported, which may be very beneficial. We do not go on a foundation of that kind; and there have been several insurances of this sort during the war, which a determination upon that point might hurt. This, however, is but a doubtful opinion, as to the legality of such insurances, and not very favourable to them. In *Planche v. Hether*, Lord Mansfield is certainly reported to have said, "It is indifferent whether the goods were English or French, and risk insured extends to all captures, which seems at first to go a great way towards giving effect to insurances against British captures." But we must suppose this to have been said, because the defendant did not press the objection; and if the party acquiesced, the expression gives no more weight to the case than belongs to any of the other cases which have been cited, such as *Bumon v. Woodbridge*, *Eden v. Parkinson*, and *Tyson v. Gurney*, in which the question was not raised at all; on the other hand, the cases of *Brandon v. Nesbitt*, and *Bristow v. Towers*, certainly proceeded on the ground of alienage. There is no express declaration, therefore, of the Court of King's Bench, either for or against the legality of such insurances; and the question comes now to be decided for the first time. We are all of opinion, that to insure enemies' property was at common law illegal, for the reasons given by the two foreign jurists to whom we have referred; if this be so, a contract of this kind, entered into previous to the commencement of hostilities, must be equally unavailable in a court of law, since it is equally injurious to the interests of the country; for if such a contract could be supported, a foreigner might insure previous to the war against all the evils incident to war. But it is said that the action is suspended, and that the indemnity comes so late, that it does not strengthen the resources of the enemy during the war. The enemy, however, is very little injured by the captures, for which he is sure at some period or other to be repaid by the underwriter. Since the case of *Bell v. Potts* it has been universally understood, that all commercial intercourse with the enemy is to be considered as illegal at common law (though, previous to that case, a very learned judge appears to have entertained doubts on that subject), and that consequently all insurances founded upon such intercourse are also illegal, because they are in contravention of his Majesty's object in making war, which is, by the capture of the enemies' property, and by the prohibition of any beneficial intercourse between them and his own subjects, to cripple their commerce. [248] The same reasoning which influenced the Court of King's Bench in their decision in *Bell v. Potts*, seems decisive in the present case; for, it being determined that, during war, all commercial intercourse with the enemy is illegal at common law, it follows that whatever contract tends to protect the enemy's property from the calamities of war, though effected antecedent to the war, is nevertheless illegal. It has been supposed, that the doctrine which has prevailed respecting ransom bills tends to favour these insurances; but no action was ever maintained upon a ransom bill in a court of common law until the case [249]

of *Ricord v. Bettenham*, 3 Burr. 1734; S. C. 1 Bl. 563; and we have the authority of Sir William Scott for saying, that in the Admiralty Court the suit was always instituted by the hostage. The case of *Ricord v. Bettenham*, however, certainly tended to show that such an action might be maintained in the courts of common law at the suit of an alien enemy. In consequence of this, a similar action was brought in *Cornu v. Blackburn*, see Doug. 641; and after argument, the Court of King's Bench held that it might be sustained. But in *Anthon v. Fisher*, see Doug. 649, 650. in notes, the contrary was expressly determined upon a writ of error in the Exchequer Chamber. We forbear to enter the argument suggested at the bar in favour of the defendant, that the law will not enforce a contract founded on a transaction detrimental to the public policy of the state. The ground upon which we decide this case is, that when a British subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country, and that if he had expressly insured against British capture, such a contract would be abrogated by the law of England. With respect to the argument insisted upon by way of answer to the public inconvenience likely to arise from permitting such contracts to be enforced, viz. that all contracts made with an enemy enure to the benefit of the King during the war, and that he may enforce payment of any debt due to an alien enemy from any of his subjects, we think it not entitled to much weight; such a course of proceeding never has been adopted, nor is it very probable that it ever will be adopted, as well from the difficulties attending it as the disinclination to put in force such a prerogative. The plaintiff, we are sorry to say, is not entitled to a return of premium, because the contract was legal at the time the risk commenced, and was a good insurance against all other losses but that arising from capture by the forces of Great Britain.

3. *GAMBA V. LE MESURIER*. M. T. 1803. K. B. 4 East, 407; S. C. 1 Smith, 101.

An underwriter of French property in time of peace is not liable for a loss by capture by the King's ships during hostilities which commenced between Great Britain and France subsequent to the policy being effected.*

This was an action upon a policy effected by French subjects before the war, which broke out in 1783, upon the ship *Acole* and her cargo, which were captured afterwards during the war. The action was brought during the period in which amity was restored between the two countries.

Per Cur. This action, for the reasons already given in the case of *Kellner v. Le Mesurier*, 4 East, 191. we are of opinion is not maintainable. The grounds upon which the counsel's arguments were founded have not induced us to alter the opinion we formed on the hearing of the former case; for it by no means follows that an action can be maintained on a contract detrimental to the interests of the state, because, until a particular statute was made to prohibit ransom-bills, actions were, in fact, maintained on such bills; for, as was observed at the bar, at the time when such contracts were allowed to be sued upon, it was supposed that the interests of the country were rather advanced than prejudiced by them. And as to the argument built upon the supposed case of a contract made before a war to supply an alien with a certain number of ships or certain quantities of goods after a war, it does not appear to us to have any bearing on the question; for such contract would not have any tendency to assist the enemy by indemnifying him against the reprisals of this country, unless the supply of ships or goods were to depend on the losses which he might happen to sustain during the war, in which case the same objection would hold as that which prevents an insurance during the war; for it differs only in degree, whether an enemy be indemnified during a war for the losses he sustains in consequence of it, or whether he receive a compensation for those same losses after the termination of the war. In both cases, the loss will at one time or another fall on the country for which the insurer is a sub.

* If a policy be upon a ship bound to a foreign port until she is twenty-four hours moored in safety there, and, previous to her arrival at her destined port, an embargo is laid on all English vessels in this port, and she on entering is also detained, and her crew made prisoners of war, the assured is entitled to recover; see *Minett v. Anderson*, Park, 211.

ject, and the enemy will, during the war, receive either means or encouragement, from his losses being in the one case compensated, as they shall happen, and in the other from his prospects of indemnity at last.

4. *POND v. KING*. H. T. 1730. K. B. 1 Wils. 191.

Action upon a policy of insurance against the underwriter upon the *Salamander* privateer (of which the plaintiff was a part owner,) from the Downs to any port or place where she should sail for, for three months from the 21st of December, 1744. The premium was four guineas per cent. per month, and no interest, free from average, and without benefit of salvage. The insurance is against such perils as are usually mentioned in policies, but with a clause at the end, that in case the ship is not heard of in twelve months, then the money shall be paid by the insurer. The breach assigned was, that this ship, the *Salamander*, was taken by a French ship of war, within three months, and was wholly lost, whereby she could not prosecute her voyage or cruise. The defendants pleaded *non assumpsit*, and upon the trial at Guildhall the jury gave a special verdict, which first finds the policy in *hæc verba*, and then that the ship set out upon a cruise the 21st of December, 1744, the time of making the insurance, and cruised until the time she was taken; that she was an English privateer duly commissioned; the number of men she had, and what guns she had at the time of the capture; and that within the three months, to wit, the 2d of February, 1744, she met a French ship in the Bay of Biscay; that in an engagement with her the *Salamander* was taken; that 117 of her men were taken out of her and carried into France, and her guns taken out; and that the *Salamander* thus taken remained in the possession of the enemy from four o'clock in the afternoon of the 2nd of February until five o'clock in the afternoon of the 5th of February; that before she was carried into any port, she was re-taken by an English privateer, the *Vulture*, Captain Hunter, and by him kept upon the high seas for eight days, without sailing; and at the end of eight days the *Vulture* took a French prize, and together with her the *Salamander*, endeavoured to come into some English port, but the wind not permitting he carried them into Lisbon; that the *Salamander* remains in the possession of the master of the *Vulture* for the benefit of those to whom she belongs; that the plaintiff is interested exceeding the sum insured; that the ship was prevented from finishing her three months' cruise by the capture, but that she was a living ship at the end of three months; that Lisbon is a neutral port; that the master of the *Vulture* commenced a suit in the Court of Admiralty at Gibraltar against the *Salamander*, and sentence there was given on the 29th of April, 1745, and a decree was made that she should be restored to the owners on payment of one-third part for salvage, which sentence still remains unreversed; and the verdict concludes in the usual form. This special verdict was twice argued at the bar by Mr. Erskine and Mr. Hume Campbell for the plaintiff, and Mr. Comyns and Mr. Henly for the defendants; and, after time taken to consider, the judgment of the whole Court was delivered by

Lee, C. J. The question in this case is, whether the capture of this ship, which was never carried *infra præsidia hostis* before she was retaken, and upon the matter as found by the verdict, shall be considered as a total loss, so as to entitle the insured to recover the whole sum insured? And although, by the civil law, perhaps, it may not be adjudged a total loss, yet the rules of that law are not to govern us, but we must give our judgment according to the common law of England, and upon this agreement between the parties, whose intention appears and must guide us. By the civil law there must be a total loss to entitle the assured to recover; but the policy in this case extends to captures or other accidents. The case of *Depiha v. Ludlow*, 1 Com. Rep. 360. before Lord King, is almost a case in point, and in that case he said he was bound to determine according to the common law and the meaning of the

* A count in a policy of insurance laying the loss by capture, is sustained by evidence that the ship was captured by a privateer, although this happened from a collusion between the master of the ship and the commander of the privateer; see *Ascongelo v. Thompson*, 2 Campb. 620.

If a ship meets with sea damage which checks her rate of

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sailing, so that she is taken by the enemy, from whom she could otherwise have escaped, the loss is to be ascribed to the capture, and not to the sea damage; for to constitute barratry it must be an act contrary to the captain's duty to wards his owners.

The sentence of condemnation of a foreign court of admiralty cannot be received in evidence without previous proof of the ship having been captured.

Insurers are liable to pay the charge of compromise bona fide made to prevent the being

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condemned as lawful prize, or to avoid a greater expense.

parties. The meaning of the parties here is plain; the insured paid his premium in consideration of the insurer's undertaking that the *Salamander* should cruise safely during three months; the jury have found she has been disabled from prosecuting her cruise for the three months. We are all of opinion for the plaintiff upon the breach assigned, and that this is not an average loss, but a total loss to the insurer; and the opinion in *Depiha v. Ludlow* warrants us in saying this insurance is to be understood for the voyage for three months, and in common sense it cannot be otherwise; so whenever the voyage is broken or interrupted, it is at an end. Safety during the three months is what is meant; but it appears the ship was taken and detained within that time, and that the plaintiff was hindered in his cruise; and this, by our law, is a total loss to the plaintiff. I have avoided saying any thing whether this was a prize or not, as being carried *infra presidia hostis*, because we are all of opinion this is a total loss.—Judgment for the plaintiff.

5. *LIVIE v. JANSON*. T. T. 1810 K. B. 12 East. 648.

In an action on a policy on ship and goods, warranted free from American condemnation, it appeared that the ship and goods were damaged by the perils of the seas, and were afterwards seized by the American government, and condemned. The Court held, that the total loss by subsequent seizure and condemnation took away from the assured the right to recover in respect to the previous partial loss by sea damage, inasmuch as the immediately operating cause of total loss was one from which, and its consequences, the underwriter was, by express provision in the policy, exempted, and as the other antecedent causes of injury never produced any pecuniary loss to the plaintiff, and as there never existed a period of time prior to the total loss in which the assured could have practically called on the underwriter for an indemnity against the temporary and partial injury.

6. *MARSHALL v. PARKER*. H. T. 1809. N. P. 2 Campb. 69. S. P. *VAGER v. PRESCOTT*. E. T. 1797. N. P. 5 Esp. 184.

Action on a policy of insurance. The plaintiff at first satisfied himself with proving that a cargo of pilchards was put on board the *Cupido* in Mount's Bay, and putting in a minute of council which directed a licence to be granted for this ship to carry a cargo of pilchards to Leghorn, and a sentence of the French Admiralty Court, whereby the cargo of the *Cupido* was adjudged good prize, the captors paying freight to the captain, to whom the vessel was ordered to be restored.

Lord Ellenborough. From the licence we may presume that the ship sailed for Leghorn; but certainly the plaintiff has not proved that she was captured on her way thither. You must lay a foundation for the sentence; at present it is merely *in vacuo*. Prove a capture, and I will receive the sentence as evidence of the facts on which the condemnation proceeded. The cargo was intercepted on the voyage insured; and though carried into Leghorn, and sold by the consignees, this is the same as if it had been carried into any other hostile port, and disposed of in any other manner. It never reached the agents of the assured. The sale was for the benefit of the captors; nor, without evidence of fraud, can I disturb the valuation.

7. *BERENS v. RUCHER*. T. T. 1758. C. P. 1 Bleu. 313.

Action on a policy of insurance, dated 21st July, 1758, on a Dutch ship called the *Ind*, and its cargo, at and from St. Eustatius to Amsterdam; warranted a Dutch ship, and the goods, property, &c., not laden in any French port in the West Indies. The cargo was worth 12,000*l.*, and was so insured at fifteen guineas per cent.; for, though the common premium before the French war was but three guineas per cent., yet it was thus advanced by the number of captures which the English had made of neutral vessels on suspicion of illicit trade; and the detention of these vessels by the proceedings in the Court of Admiralty. The defendant underwrote 8*l.* of the plaintiff's for a premium of 1*l.* 18*s.* 3 1-2*d.* In May, 1758, the ship was at St. Eustatius, taking in her cargo, which consisted of sugar and indigo, and other French commodities, which were put on board her, partly out of barks from sea, partly from

the shore of the island. The 18th of June, 1758, she sailed on her voyage; 27th of June was taken by an English privateer; 28th of June was carried into Portsmouth. On the 1st of August the sailors were examined upon the standing interrogatories prescribed by stat. 29-Geo. 2. c. 34. and the captain entered his claim in the Admiralty Court. In October, 1758, the claimants were cited to specify what part of the goods were taken from the shore of St. Eustatius, and what from the barks. Citation continued from Court to Court till February, 1759. The 24th of February, 1759, interlocutory decree was pronounced for the contumacy of the claimants, in not specifying what parts of the cargo were so taken, and that therefore the goods should be presumed French property. Appeal to Lords Commissioners of Prizes. Many causes stood before it. The market was very high. The cargo in part was perishable; wherefore the agent of the owners agreed with the captors to give them 800*l.* and costs, to obtain a reversal of the sentence. The reversal was heard by consent; and, in order to give costs to the captors, it was decreed by consent that there was a sufficient cause for seizure, and thereupon costs were decreed to the captors, and restitution of the cargo to the owners was also ordered.

Lord Mansfield. The first question is, whether this was a just capture? Both sentences are out of the case, being done and undone by consent. The capture was certainly unjust. The pretence was, that part of this cargo was put on board of St. Eustatius out of barks, supposed to come from the French islands, and not loaded immediately from the shore. This is now a settled point by the Lords of Appeal, to be the same thing as if they had been landed on the Dutch shore and then put on board afterwards, in which case there is no colour for seizure. The rule is, that if a neutral ship trades to a French colony, with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked upon as a French ship, and is liable to be taken; not so if she has only French produce on board, without taking it in at a French port; for it may be purchased of neutrals. Second question; whether the owners have acted *bona fide* and uprightly, as men acting for themselves, and upon a reasonable footing, so as to make the expences of this compromise a loss to be borne by the insurers? The Judge of the Admiralty's order to specify was illegal, contrary to the marine law and the act of parliament, which is only declaratory of the marine law; because, if they had specified, it could be of no consequence, according to the rule I before mentioned; yet the captors were, however, in possession of a sentence, though an unjust one; and a court of appeal cannot, or seldom does, upon a reversal, give costs or damages which have accrued subsequent to the original sentence, for those damages arise from the fault of the judge, not of the parties. Under all these circumstances, therefore, the owners did wisely to offer a compromise. The cargo was worth 12,000*l.* The appeal was hazardous, the delay certain. Van do Poll, the Dutch deputy in England, negotiated the compromise; the Chamber of Commerce at Amsterdam ratified and thought it reasonable. Had the whole sentence been totally reversed, the costs must have sat heavy on the owners. I therefore think the insurers liable to answer this average loss, which was submitted to, to avoid a total one. Verdict for the plaintiff.

S. Goss v. WITHERS. M. T. 1758. K. B. 2 Burr. 683. *MILLER v. FLETCHER.* E. T. 1780. K. B. Doug. 219. S. P.

This was a special case from the sittings in London upon two actions on two distinct policies of insurance, one upon a ship and the other upon the loading. The former was an insurance upon the David and Rebecca, at and from Newfoundland to her port of discharge in Portugal or Spain, without the Straights, or England, to commence from the time of her beginning to load at Newfoundland, and to continue during her abode there, and until the said ship, with all her ordnance, tackle, &c., of the ship; beginning the adventure at Newfoundland, and to continue during her abode there, and until the said ship, with all her ordnance, tackle, &c., should be arrived at her port of discharge as aforesaid, and until she should have been moored at anchor twenty-four hours in safety.

takes places, if the ship be under a disability to complete her voyage, and the adventure be not only retarded, but in effect destroyed the underwriters will be liable for a total loss.

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It was to be lawful for the ship to touch at and stay in any port whatsoever, without prejudice to the insurance. The ship was by agreement, to be valued at the sum subscribed, without further account. And, in case of loss or misfortune, it was to be lawful for the assured, their servant, &c. to sue, labour, and travel for, in, or about the defence, without safeguard, and recovery of the ship or any part thereof, without prejudice to the assurance, to the charges whereof the insurers were to contribute *pro rata*. The insurance was to be at ten guineas per cent., and in case of loss, to abate at 2l. per cent., and in case of average loss not exceeding 5l. per cent. to allow nothing towards such loss; and if the vessel discharged without the Streights, excepting the Bay of Biscay, two guineas per cent. were to be returned, and if she sailed with convoy and arrived, two guineas more per cent. were to be returned. The plaintiffs declared upon a total loss by capture by the French. The policy declared upon in the other action was an insurance upon any kind of lawful goods and merchandize, loaden or to be loaden on board the aforesaid ship, which for 7l 7s. insured 70l.; and the declaration alleged that divers quantities of fish and other lawful merchandizes, to the value of the money insured, were put on board, to be carried from Newfoundland to her port of destination, and so continued, except such as were thrown overboard, as it is after mentioned, till the loss of the ship and goods. The declaration then avers that a quarter of the said goods were necessarily thrown overboard in a storm, to preserve the ship and the rest of the cargo, after which jettison the ship and the remainder of the goods were taken by the French. There was another count in this declaration for money had and received to the use of the plaintiffs. The case states that the ship departed from her proper port, and was taken by the French on the 23rd of December, 1756, and that the master, mates, and all the sailors, except an apprentice and a landsman, were taken out and carried to France: and that ship remained in the hands of the enemy eight days, and was then retaken by a British privateer, and brought in on the 18th of January to Milford Haven, and that immediate notice was given by the assured to the insurers, with an offer to abandon the ship to their care. It was also proved at the trial, that before the taking by the enemy, a violent storm arose at sea, which first separated the ship from her convoy, and afterwards disabled herself so far as to render her incapable of proceeding on her destined voyage without going into port to refit. It was also proved that part of the cargo was thrown overboard in the storm, and the rest of it was spoiled whilst the ship lay at Milford Haven, after the offer to abandon and before the ship could be refitted; and the assured proved their interest in the ship and cargo to the value assured. Several questions arising upon the trial of the first of the said causes, it was agreed that the jury should bring in their verdict in both causes for the plaintiffs, as for a total loss, subject, however, to the opinion of the Court on the following questions: viz. 1st. Whether this capture of the ship by the enemy was or was not such a loss as that the insurers became liable thereby? 2ndly. Whether, under the several circumstances of this case, the assured had or had not a right to abandon the ship to the insurers after she was carried into Milford Haven?

Per Cur. The general question is, whether the plaintiffs were, on the 18th of January, 1757, entitled to recover against the insurers, as upon a total loss, under an offer to abandon the ship and cargo to the insurers, for them to make what advantage of salvage they could? for an offer to abandon was then made and nothing has happened since that time to alter the case. There is one point, which we are all of opinion is immaterial as between the insurers and the insured, viz. whether by this capture the property was or was not transferred to the enemy by the law of nations? That question can happen but in two cases, viz. 1st. Between the owner and a neutral person who has brought the capture from the enemy. 2nd. Between the owner and recaptor. If the ship taken by an enemy escapes from the enemy, or is retaken, or if the owner redeems (ransoms) the capture, his property is thereby reeverted, which property in the ship taken was by the law of nations obtained by the captor. The

ship is lost by the capture, though she be never condemned at all nor carried into any port or fleet of the enemy, and the insured must pay the value. If, after condemnation, the owner recovers or retakes her, the insured can be in no other condition than if she had been recovered or retaken before condemnation. The reason is plain from the nature of the contract; the insurer runs the risk of the insured, and undertakes to indemnify; he must therefore bear the loss actually sustained, and can be liable to no more; so that if after condemnation the owner recovers the ship in her complete condition, but has paid salvage or been at any expense in getting her back, the insurer must bear the loss so actually sustained. The loss and disability was in its nature total at the time it happened. During eight days the plaintiff was certainly entitled to be paid by the insurer as for a total loss, and in the case of a recapture the insurer would have stood in his place. The subsequent recapture is, at best, a saving only of a small part; half the value must be paid for salvage. The disability to perform the voyage still continued. The master and mariners were prisoners; the charter-party was dissolved; the freight, except in proportion to the goods saved, was lost; the ship was necessarily brought into an English port, though what could be saved might not be worth the expense attending it, which is proved by the plaintiff's offer to abandon. The subsequent title to restitution arising from the recapture, at a great expense, of the ship, disabled to pursue her voyage, cannot take away a right vested in the insured at the time of the capture; but because he cannot recover more than he has suffered he must abandon what may be saved. We are, therefore, of opinion that the loss was total by the capture, and the right which the owner had after the voyage was defeated, to obtain restitution of the ship and cargo, paying great salvage to the recaptor, might be abandoned to the insurers after she was brought into Milford Haven.

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9. HAMILTON v. MENDEZ. T. T. 1761. K. B. 2 Burr. 1189.

That the ship Selby, mentioned in the policy, being valued at 1,200*l.*, and the plaintiff having interest therein, caused the policy in question to be made; and the same was accordingly made in the name of John Mackintosh, on behalf and for the use and benefit of the plaintiff, and was subscribed by the defendant as stated for 100*l.*; that the ship was in good safety at Virginia, where she took on board 192 hogsheads of tobacco, to be delivered at London; that on the 28th day of March, she departed and set sail from Virginia to London; and on the 6th day of May following, as she was sailing and proceeding in her said voyage, was taken by a French privateer, called the Aurora, of Bayonne; that at the time of the capture the Selby had nine men on board, and the captain of the said privateer took out six, besides the captain, leaving only the mate and one man on board; that the French put a prize master and several men on board the ship Selby to carry her to France; that as the French were carrying her towards France on the 23d day of the said May she was retaken off Bayonne by an English man of war, and accordingly sent into Plymouth, where she arrived the 6th day of June following; that the plaintiff, living at Hull, as soon as he was informed what had befallen his ship, the Selby, wrote a letter on the 23rd of June to his agent John Mackintosh, living in London, to acquaint the defendant, "that the plaintiff did from thence abandon to him his interest in the said ship, as to the said 100*l.* by the defendant insured;" that the said J. M. on the 26th of June, acquainted the defendant with the offer to abandon the ship; to which the defendant answered, "that he did not think himself bound to take to the ship, but was ready to pay the salvage; and all losses and charges that the plaintiff sustained by the capture;" that upon the 19th day of August, the ship Selby was brought into the port of London, by the order of the owners of the cargo and the recaptors; that the ship Selby sustained no damage from the capture; that the whole cargo of the said ship was delivered to the freighters at the port of London, who paid the freight to Benjamin Vaughan, without prejudice. The question, therefore, submitted to the opinion of the Court is whether the plaintiff on the said 26th day of June had a right to abandon, and has a right to recover as for a total loss? After two arguments at bar upon this question, and after the Court had

But when a capture is followed by a recapture, and the ship is enabled to proceed to her place of destination, although the market and voyage may have been lost, the loss becomes par tial instead of total, and the underwriters are only liable to the extent of the partial loss.

- [257] taken time to deliberate upon it, their unanimous resolution was delivered by the Chief Justice, Lord Mansfield. The plaintiff has averred in his declaration, as the basis of his demand for a total loss, that by the capture the ship became wholly lost to him. The general question is, whether the plaintiff, who at the time of his action brought at the time of his offer to abandon, and at the time of his being first apprized of any accident having happened, had only in truth sustained a partial loss ought to recover for a total one? In support of the affirmation, the counsel for the plaintiff insisted on the four following point: 1st. That by this capture, the property was changed, and therefore the loss total for ever. 2ndly. If the property were not changed, yet the capture was a total loss. 3rdly. That when the ship was brought into Plymouth, particularly on the 26th day of June, the recovery was not such as in truth changed the totality of the loss into average. 4thly. Supposing it did, yet the loss having once been total, a right vested in the insured to recover the whole upon abandoning, of which right he could never be divested by any subsequent event. As to the first point: if the change of property were at all material between the insurer and the insured, it would not be applicable to this case; because by the marine law of England, there is no change of property in case of a capture before condemnation; and now by the act of parliament the *jus postliminii* continues for ever. I know many writers argue between the insurer and the insured, from the distinction whether the property was or was not changed by the capture, so as to transfer a complete right from the enemy to a recaptor, or neutral vendee, against the former owner. But arbitrary notions concerning the change of property by capture, as between the former owner and recaptor, or a vendee, ought never to be the rule of decision as between the insurer and insured upon a contract of indemnity, contrary to the real truth of the fact; and therefore I agree with the counsel for the plaintiff upon this second point, that by this capture, while it continued, the ship was totally lost, though it be admitted that the property, in the case of a recapture, never was changed, but returned to the former owner. The third point depends, as every question of this kind must, upon the particular circumstances. It does not necessarily follow that because there is a recapture therefore the loss ceases to be total. If the voyage be so defeated as not to be worth the further pursuit; if the salvage be high, and the other expenses great; or if the underwriters refuse to bear these expenses, the insured may abandon. But in the present case, the voyage was so far from being lost, that it had only met with a short temporary obstruction; the ship and cargo were both entirely safe; the expense incurred did not amount to near half the value; and upon the 26th of June, when the ship was at Plymouth, and the offer was made to abandon, the insurer undertook to pay all charges and expenses to which the plaintiff might be put by the capture. The only argument to show that the loss had not then ceased to be total was built upon a mistaken supposition, that the recaptors had a right to demand a sale, and to put a stop to any further prosecution of the voyage. But that is not so. The property returned to the plaintiff, pledged to the recaptors for one-eighth of the value as salvage for retaking and bringing the ship into an English port. Upon paying this, the owner was entitled to restitution. The recaptors had no right to sell the ship. If they differed about the value, the Court of Admiralty would have ordered a commission of appraisement. In this case it was the interest of the owner of the ship, the owners of the cargo, and the recaptors that she should forthwith proceed upon her voyage from Plymouth to London. But had the recaptors opposed it, or affected delay, the Court of Admiralty would have made an order for bringing her immediately to London, her port of delivery upon reasonable terms. Therefore it is most clear that upon the 26th of June the ship had sustained no other loss, by reason of the capture, than a short temporary obstruction, and a charge which the defendant had offered to pay and satisfy. This brings the whole to the fourth and last point, the plaintiff's demand as for an indemnity. This action then must be founded upon the nature of his damnification, as it really is at the time the action is brought. It is
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repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event had decided that the damnification in truth is an average, or perhaps no loss at all. Whatever undoes the damnification in whole or in part operates upon the indemnity in the same degree. It is a contradiction in terms to bring an action for indemnity, when upon the whole event no damage has been sustained. The reason is so much founded in sense and the nature of the thing, that the common law of England adopts it though inclined to strictness. The tenant is obliged to indemnify his lord from waste; but if the tenant do suffer waste to be done in houses, yet if he repairs before any action brought, there lies no action of waste against him. He cannot, however, plead *non fecit vastum*, but the special matter. The special matter shows that the injury being repaired before the action brought, the plaintiff had no cause of action, and whatever takes away the cause takes away the action. Suppose a party sued to judgment, and afterwards before an action is brought the principal pays the debt and costs, and procures satisfaction to be acknowledged upon record; the surety can have no action from indemnity, because he is indemnified before any action is brought. If the demand or cause of action does not subsist at the same time the action is brought, the having existed at any former time can be of no avail. But in the present case the notion of the vested right in the plaintiff to sue as for a total loss before the recapture is fictitious only and not founded in truth; for the insured is not obliged to abandon; in any case he has an election. No right can vest as for a total loss, till he has made that election; he cannot elect before advice is received of the loss; and if that advice show the peril to be over, and the thing in safety, he cannot elect at all, because he has no right to abandon when the thing is safe. Writers upon maritime law are apt to embarrass general principles with the positive regulations of their own country; but they all seem to agree, that if thing be recovered before the money is paid, the insured can only be entitled according to the final event. His lordship here cited a passage from Roccus.

When the insured is a foreigner, he is entitled to recover on the policy, al

{ 259 } though the property has been sacrificed to prevent its falling into the hands of the enemies of his country, and not the enemies of this.

The word "people" in the policy means the ruling power of the country, not, therefore, a mob of pirates.

(c) *By jettison.**

BUTLER v. WILDMAN. H. T. 1820. K. B. 4 B. & A. 398.

The captain of a Spanish ship, in order to prevent a quantity of dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw the same into the sea and was immediately afterwards captured. In an action upon a policy of insurance upon Spanish property, subscribed by British subjects, the Court held: 1st. That the underwriters, who at the time of effecting the policy knew that the assured were Spaniards, and that Spain was at war with the state to whom the capturing vessel belonged, and that this was a loss by jettison, that term, in a policy of insurance, signifying any throwing overboard of the cargo for a justifiable cause. 2ndly. That it was a loss by enemies. And 3rdly. If not by jettison, in the strictest sense, that it was something of the same kind, and therefore came within the words "all other losses and misfortunes."

(d) *By arrest, confiscation, and detention of princes and people.*

1. NESBITT v. LUSHINGTON. T. T. 1792. K. B. 4 T. R. 783.

A party of rioters boarded a ship, and having taken the command, stranded her, and compelled the captain to sell the cargo, which consisted of wheat, at their own price, and much below its real value. It was holden that the plaintiff, who had insured the cargo, could not recover on a count stating that the vessel was arrested, distrained, and detained by people to the plaintiff unknown, by reason whereof the cargo was wholly lost to the plaintiff, because

* Jettison, as used in a policy of insurance, signifies any throwing overboard of goods *ex justa causa*. Thus a casting away of goods on the approach of an enemy, to prevent them from falling into the enemy's hands in case the ship should be taken, is a loss by jettison within the meaning of the policy. And if the master's conduct in such a case appear not to have been the effect of a vain fear but of a resolution wisely and honestly taken, the underwriter cannot object to the course adopted, although it may deprive them of some advantages, as for instance of the chance of recapture of the property swallowed up by the waves.

the words in a policy "kings, princes, and people," must apply to nations in their collective capacity.

2. *ROTCH v. EDIE*. M. T. 1795. K. B. 6 T. R. 413. S. P. SCHRODER v. THOMPSON. E. T. 1820. C. P. 1. Moore, 163; S. C. 7 Taunt 462.

The clause of indemnity against arrests of princes, people, &c., extends to an embargo laid by the government of the country in the port at and from which the ship is insured.

A special case upon the trial of an action on a policy of insurance on three ships, the *Adelaide*, *Adele*, and *Victor*, their stores, boats, fishing materials, &c., upon two of them at and from L'Orient, and upon the third at and from and after her arrival at L'Orient, and on all of them to all ports, seas, and places whatsoever, beyond and on this side the Capes of Good Hope and Horn, on the southern whale and seal fishery and trade, and until the ship's arrival back at L'Orient. The loss is stated by the declaration to have happened by the ships and their stores and provisions being, by authority of certain persons exercising the powers of government in France, at port Louis with respect to one, and L'Orient with respect to the two others, arrested and restrained from further prosecuting their voyages, and that they had thence hitherto been prevented and restrained therefrom under and by virtue of such restraint. The case stated that the ship *Adelaide* sailed from the port of L'Orient on the voyage insured, but was obliged to put back by stress of weather into Port Louis, and whilst she lay there, and the ships *Adele* and *Victor* were preparing for the voyages in the policies mentioned, and before the necessary passports and clearances could be obtained, on the 5th of February, 1793, an embargo was laid on all vessels in those ports; that the *Adelaide* was brought back to L'Orient, and the perishable stores of all the three ships sold; and the said three vessels, with the rest of the stores, now remain at L'Orient under the embargo, which has continued ever since on all ships destined on long voyages, and none have since been permitted to sail, except those in government service or upon short coasting voyages. The *Adele* and *Victor* had entered outwards upon the voyages insured when the embargo came, and that alone prevented the ships from sailing. Notice of abandonment was given to the underwriters on the 27th of February, 1793, and a total loss claimed, and the like notice and claim were repeated in August, 1793.

Per Cur. We have looked into all the cases which have been cited, and we have also considered the passages collected from foreign writers, and the most respectable of them seem to me to coincide with the construction which an English court of justice would put upon such an instrument as the present. This plaintiff is under no disability to sue, and the defendant has entered into an engagement to indemnify him against arrests, restraints, and detentions, of all kings, princes, and people, of what nation, condition, or quality soever. By this peril the ship has been detained near three years and the voyage is defeated; but the plaintiff is told this is not a loss within the policy. No common man, reading the words of the policy, could doubt upon the question; and it is by artificial reasoning only, collected by great reading upon foreign authors, that his claim can be repelled, but, in truth, when examined, the research turns out to be all one way, and that is in favour of the plaintiff. *Roccus v. Le Guidon*, and *Green v. Young*, from Lord Raymond, are all one way; and although Lord Holt is said not to have given an absolute opinion, every thing that fell in judgment from that great man is deserving of the highest attention. Lord Mansfield too has given an opinion upon the very point (2 Burr. 696); and when, to this current of authorities, we add the words of the policy itself, it is perfectly clear. Suppose war had been declared, and the ship had been detained in port as a prize; could there have been a doubt? and we can see no difference between the cases.

3. *BRANDON v. CURLING*. M. T. 1803. K. B. 4 East, 410.

Under this clause there is an implied exception of any loss

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An insurance on goods from London to Bayonne, in France, shipped on board a neutral ship, on account and at the risk of Frenchmen, before the declaration of hostilities between Great Britain and France, but exported afterwards. The question is, whether it could be enforced against the underwriters, even after the restoration of peace, to recover a loss by capture of a co-belligerent (though not stated to be an ally) of Great Britain, during the war;

for the Chief Justice (Lord Ellenborough) expressly said, in delivering the judgment of the Court; where an insurance is upon goods generally, a proviso to this effect shall in all cases be considered as engrafted therein, namely, "provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assured;" because, during the existence of such hostilities, the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other; and in like manner, and upon similar principles of public policy, the risk of detention of princes, &c. must be understood to be restrained and qualified by an implied proviso, or that it shall not "extend to cover any loss happening in the course of any contraband adventure, in which the goods would become liable to seizure as forfeited by the laws of this country."

4. *FONDER V. CHRISTIE*. E. T. 1809. K. B. 11 East, 205.

A British ship, insured from Hull to St. Petersburg, having sailed under convoy to the Sound, was afterwards stopped in her course by a King's ship in the Baltic, from an apprehension of hostilities, for eleven days, and then proceeded to a point of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy till the King's officer received intelligence that a hostile embargo was laid on British ships at St. Petersburg, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to Hull.

Per Cur. This is no more than a detention by the convoy for a certain period, till, by the laying on a hostile embargo in the destined port, the further prosecution of the adventure became impracticable, and the voyage was lost, which, according to *Hadkinson v. Robinson*, is not a loss within the policy. There was indeed a detention by the King's ship, but there was no loss on that detention. Suppose there had been fair weather to a certain point of the voyage, and then bad weather and adverse winds, which had prevented the vessel from entering her port of destination till she had received the advice of the embargo, which obliged her to put back; could that have been declared upon as a loss by the perils of the sea? And yet that might as well be said to be the *causa remota* of the loss of the voyage, as the detention in this case; but that will not do; the risk insured against must be the effective cause of the loss in order to charge the underwriters. But here there was the concurrence of another overbearing cause, namely, the hostile embargo in the destined port, which was the immediate cause of the ship's return, and of the loss of the voyage; and the king's officer only prevented the ship from going into the enemy's port, and incurring a loss by capture; and such detention is not within the meaning of the clause against the "arrest and detainment of kings," &c. Lord Alvanley, in the case of *Hadkinson v. Robinson*, said, that in order to bring the loss within the policy, the peril insured against which occasions it must act directly, and not collaterally, upon the thing insured.

5. *LEVI V. ALLNUTT*. E. T. 1812. K. B. 15 East, 267.

This was an action on a policy of insurance on goods on board the ship *Theseus*, at and from London to any ports or places in the Baltic, backwards and forwards, including the risk of transshipment into boats, &c., and also inland navigation and land carriage, or any other conveyance, until the goods were safely delivered at the houses, &c., of the different consignees, &c., at a premium of twenty guineas per cent., to return 10l. per cent. for arrival, warranted free from confiscation by the government in the ship's port or ports of discharge. The loss was averred in the several counts to be, 1st. By capture, as prize, while the ship with her cargo was on the high seas, and not in her port of discharge: 2ndly. While she was on the high seas, viz. in the roads of Pillau, and not from confiscation by the government in the ship's port of discharge: 3rdly. While she was on the high seas, viz. in the roads of Pillau, by hostile capture by the King's enemies, and not from confiscation by the government in the ship's port of discharge.—A verdict was found for the plaintiff. *Per Cur.* After recognizing the facts as before stated, it appears

happening in the course of any contraband adventure, in which the goods would be come liable to seizure or be forfeited by the laws of the country.

A detention by a King's ship, whereby the assured was prevented reaching the port of destination before an embargo was laid on, as he otherwise might have done, is not a loss within the risk of detention by princes.

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A permission by one government to another to seize property, is not a confiscation by the former.

to the Court that the conduct of the Prussian government showed the vassalage subjection of it to France, but could not be deemed an act of confiscation by that government; it only showed a permission by the Prussian government that France should do as it pleased in the Prussian ports; and to hold this to be a Prussian confiscation would be saying that every country on the continent too weak at this period to protect its independence against France confiscated all the property which the French chose to take within his territories.

6. CARRUTHERS V. GRAY. H. T. 1812. K. B. 15 East, 35; S. C. 3 Campb.

142.

If it be averred in the declaration that the goods insured were arrested by the person exercising the powers of government, and seized, detained, and confiscated, it is sufficient to shew that the goods were forcibly taken from on board the ship, if the officers of government never delivered to the consignees, without putting in any sentence of condemnation.

[263] After the ship was laden for the voyage by Oppenteimer, and the captain, who was also owner of the ship, had obtained his manifest and clearances at the Custom-house, sixteen bales of goods belonging to the assured were put on board by the packer of goods, who had made all the entries necessary at the Custom-house. It was thereupon objected that the captain should have made a second clearance, the sixteen bales not being comprised in his manifest, nor in the contract delivered by him. The plaintiffs, however, obtained a verdict, which it was now moved to set aside, on the ground that the requisitions of the stat. 13 & 14 Car. 2. c. 11. were not complied with, and, therefore, though the loss did not happen on this account, the assurance was vacated, it being a condition implied in every policy that the ship should be dismantled and cleared out according to law. It was admitted that there was no ground for imputing fraud to the assured, but contended that the provisions of the act had not been pursued. The third section enacts, "that no captain of any vessel shall take on board any English goods to be exported, until he shall have entered such ship in the book of the commissioners, customer, or collector, and comptroller outwards of such port where he shall take in goods, together with the name of such captain, the burden of such ship, the number of guns, and to what port she intends to sail, and before he shall depart with such ship out of such port, shall bring unto the said person who shall be appointed for managing the customs, the customer, or collector, and comptroller of such port, a contract in writing under his hand of the names of every merchant, and other person or persons, that shall have laden and put on board any such ship such goods, together with the marks and numbers of such goods; and shall likewise, publicly, in the open Custom-house, upon his oath, to the best of his knowledge, have answered to such questions as shall be demanded of him concerning the same." It is not enough, therefore, under this clause, that the agent for the freighter has made the entries, unless the captain has also made them before he sails. The omission to do so makes the ship liable to seizure, and so increases the risk of the underwriter; and although the loss may not have arisen on that account, it will not make any difference; 7 Term. Rep. 160. If the owner of the ship was to do an act, the omission of which alters the risk of the underwriter, that will avoid the policy; and it is the same where the assurance is upon goods.

Lord Ellenborough, C. J. Can you show by the statute that the ship is seizable? By the stat. 12 Geo. 1. c. 28 s. 17. the officer, after entry of the goods (mentioned in that clause), may search the bales, and if the goods be not rightly entered, may seize them, and the same are forfeited.

Bayley, J. Have you any case to show that there is an implied warranty on the part of the assured on goods that the ship shall be properly cleared out?

There is no case to the effect; but there is no case which makes a distinction in that respect between the assured on ship and the assured on goods.

Lord Ellenborough, C. J. It not only appeared on the part of the assured that there was no fraud, but also no negligence. The sixteen bales were included in one of the papers which was on board; the cocket was on board.

7. SALOUCCI V. JOHNSON. H. T. 1780. K. B. 1 Park, Ins. 125.

In case of a detention of a neutral ship by a foreign power. This was an insurance on the ship *Thetis*, a neutral ship; and upon the trial a special case was reserved for the opinion of the Court, stating that the plaintiffs were Tuscan subjects, resident at Leghorn, sole owners of the ship *Thetis*, which sailed from Leghorn, and was captured by a Spanish ship off

the coast of Barbary, with neutral goods on board consigned to London; she was condemned as prize in the Court of Vice Admiralty in Spain, which sentence was reversed; but upon another appeal to a superior court, the latter sentence was also reversed, and the former confirmed. The grounds of condemnation were two: 1st. That the ship *Thetis* refused to be searched, and resisted with force, having fired at the Spanish ship. 2nd. That she had no charter-party on board. The captain of the *Thetis* answered these two grounds: 1st. That he resisted and fired because the Spaniard hailed him under false colours. 2nd. That he had taken the goods on board by the piece, and had not freighted his ship to any individual, in which case a manifesto was sufficient without a charter-party. The sentence of the last court of appeal, although it condemns, admits the neutrality, for it states the vessel to be a *Tuscan ship*. The last ground, relative to the charter-party, was not insisted upon. Upon the other, three learned judges were of opinion, that a neutral ship is not obliged to stop to be searched; that the captain had not been guilty of barratry; that the searcher stops a neutral ship at his peril; that this was to be considered as a case of improper detention, and consequently that the plaintiff upon this policy was entitled to recover.

(e) *By pirates, rovers, and thieves.**

(f) *By barratry.†*

1. VALLEGO V. WHEELER. E. T. 1789. K. B. Cowp. 143; S. C. Lofft. 631.

In an action on a policy of insurance upon goods on board the *Thomas and Matthew* from London to Seville. The policy was made in the common form, with liberty to touch at any ports or places, &c. The loss was assigned in different ways in the declaration; first, by storms and perils of the sea, in consequence of which the ship was obliged to go to Dartmouth to be repaired, and that afterwards a further loss happened by storms; or, secondly, that it happened by storms and perils of the sea in the voyage generally; and thirdly, by the barratry of the master. On the trial it was proved that this ship was put up as a general ship from London to Seville, and was let to freight to one Darwin, to whom she was chartered by Brown, the captain; that it is in course of vessels going on this voyage to stop at some port in the west of Cornwall to take in provisions; that this ship, having taken her cargo on board, sailed from London to the Downes; that while she lay there all the other ships bound to the westward bore away; but she staid till the night after, and then sailed to Guernsey, which was out of the course of the voyage; that the captain went there for his own convenience, to take in brandy and wine on his own account, after which, he intended to proceed to Cornwall; that the night

* Losses by pirates, rovers, and thieves, are also included in the policy. These words apply to the wrongful and felonious acts of individuals, as the words "kings, princes, and people," in the policy apply to the acts of nations in their collective capacity; see 4 T. R. 785. Where a ship laden with corn was driven by stress of weather into *Aly Harbour* in Ireland, and provisions being scarce, the people in a tumultuous manner took the command from the captain, and caused the ship to strike upon a reef of rocks. Lord Kenyon thought that the loss might be considered as a loss by piracy; see 4 T. R. 487; Com. Rep. 360. Piracy, according to our law, includes those offences committed at sea (Hawk. b. 1. c. 28. s. 11.) which if done on land would have amounted to felony; see *post*, tit. Piracy. It seems to be piracy for the mariners of a ship to seize the captain, put him on shore against his will and afterwards employ the ship for their own purposes; see 2 East, P. C. 796. But when the master of a vessel insured the ship and cargo, landed the goods, and on the destruction of the former protested both as lost, with intent to defraud the owners and insurers, this was held to be a mere breach of trust, and not felony, because there was no determination of the special authority with which the defendant was entrusted. And the same rules apply to this offence as prevail with respect to larceny. When the subject from whom the goods are taken is at enmity to the King of England, see Com. Dig. Admiralty, E. T. 4 Inst. 154. or at enmity with the state to which the captors belong, the offence is not piracy. Nor is it piracy when the offence is committed in a port or creek, or the river Thames, or other place *infra corpus comitatus*, since the crime is then a felony, and triable at common law; see Moore, 736; 3 East, 112; 1 Roll. 173; Hawk. b. 1. c. 28. s. 11.

† As to the penal consequences attending the wilful destruction of ships, see 1 Anne c. 2. s. 4; 4 Geo. 1. c. 12; 11 Geo. 1. c. 29; s. 67.

after the ship quitted Guernsey, she sprung aleak, which obliged her to put into Dartmouth. When she was refitted, she set sail again and proceeded for Helford, in Cornwall, where it was always intended she should stop to take in provisions; but in her way she received further damage, and on her arrival there was totally incapable of proceeding on the voyage, and the goods were much damaged. It was attempted, on the part of the defendant, to prove that one Willes was the owner of the ship, that the voyage to Guernsey was on his account, and that the goods taken on board there were his property; but this evidence went little further than information and belief, except that it was proved that when the ship arrived at Helford the wine was delivered to him in his cellar. The learned judge directed the jury, that if the going to Guernsey was without the knowledge of Darwin, it was barratry, and they ought to find for the plaintiff; but if done with his knowledge, then it was not barratry; that if they should be of opinion, that it was without the knowledge of Darwin, he desired them to say, whether they thought it was with the knowledge of Willes or not. The jury found a verdict for the plaintiff, and said they thought the going to Guernsey was without the knowledge of Darwin, whom they looked upon to be the true owner; but they were of opinion it was with the knowledge of Willes. A motion was afterwards made for a new trial; and the case being a question of great consequence to the mercantile world was twice argued at the bar; after which, the judges were unanimously of opinion that the plaintiff was entitled to recover, but they delivered the reasons of their judgment *seriatim*.

Lord Mansfield. "The ground of the motion for a new trial in this case is, that the circumstances, as they were given in evidence to the jury, the carrying the ship to Guernsey, was merely a deviation, but not barratry. Much more stress was laid at the trial than in either of the arguments upon this fact, namely, that the deviation being with the knowledge of Willes, the owner, (though not owner *pro hac vice*) of the ship, it could never be barratry; and, therefore, the jury were pressed to say, whether it was with the consent of Willes or not; and they said it was. To be sure, nothing is so clear as that if the owner of a ship insure, and bring an action on the policy, he can never set up as a crime a thing done by his own directions or consent. It was, therefore, a material fact to proceed upon, if Willes had had any thing to do in the case; but he had not. It appeared to me that the nature of barratry had not been judicially considered or defined in England with accuracy. In all mercantile transactions the great object should be certainty; and, therefore, it is of more consequence that the rule should be certain, than whether the rule is established one way or the other; because speculators in trade then know upon what grounds to proceed." His lordship then stated some cases from Strange, Rep.; and, after giving a definition of the word barratry, he proceeded thus: [266] "In this case, the underwriter has insured against all barratry of the master, and we are not in a case where the owner or freighter is privy to it; if we were, it is evident that no man can complain of an act to which he is himself a party. In this case, all relative to Willes may be laid out of it; he is originally the owner, but not the insurer here. Darwin was the freighter of the ship, and the goods that were on board were his; if any fraud be committed on the owner, it is committed on Darwin. The question then is, what is the ground of complaint against the master? He had agreed to go on a voyage from London to Seville. Darwin trusts he will set out immediately; instead of which, the master goes on an iniquitous scheme, totally distinct from the purpose of the voyage to Seville; that is a cheat and a fraud on Darwin, who thought he set out directly; and whether the loss happened in the act of barratry, that is, during the fraudulent voyage, or after, is immaterial, because the voyage is equally altered, even though there is no other iniquitous intent. But in the present case there is a great deal of reason to say that the loss sustained was in consequence of the alteration of the voyage. The moment the ship was carried from its right course it was barratry; and here the loss happened immediately upon the alteration. Suppose the ship had been lost after-

wards; what would have been the case of the insured, if he were not secured against the barratry of the master? He would have lost his insurance by the fraud of the master; for it was clearly a deviation; and the insured cannot come upon the underwriters for a loss in consequence of a deviation. Therefore, I am clearly of opinion that this smuggling voyage was barratry in the master."

Mr. Justice Aston. "I wonder that there should remain a doubt at this day, what is meant by barratry in the master. In different ordinances different terms are used; but they all have the same meaning. In one of the ordinances of Stockholm, it is called 'knavery of the master or mariners;' and the facts stated here clearly fall within that description. Where it is a deviation with the consent of the owner of the vessel, and the master is not acting for his own private interest, in such case it is nothing but a deviation with the consent of the owner, and the underwriter is excused. In this case the hull of the ship belonged to Willes, but he had nothing to do with it, having chartered it to Darwin; the jury, therefore, did right in considering Darwin the owner *pro hac vice*. Having considered him in that light, the conduct of the master was clearly barratry; for he was acting for his own benefit, without intending any good to his owner, and without his consent and privity. No one knows when the first commencement of the injury happened, but most probably on the return of the ship to Dartmouth from Guernsey, where he had been for the purpose of smuggling. Therefore, I am clearly of opinion that this change of the voyage for an iniquitous purpose was barratry, which is not confined to the running away with the ship, but comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighter are injured."

Mr. Justice Willes. "The only doubt I had in this case was, at what time the loss happened; and I think it may reasonably be said to have happened in consequence of the smuggling voyage; for if the ship had proceeded on her first intended course, she would have escaped the storm. Though this was a deviation, yet it is a fair and just rebutter to say, that it was barratry in the master, which is a peril insured against by the policy."

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2. KNIGHT v. CAMBRIDGE. E. T. 1770. K. B. 1 Stra. 586; S. C. 2 Ld.

Raym. 1349, 8 Mod. 230. Cited 8 East, 135. 136.

Action on the case upon a policy of insurance, whereby the insurer undertakes against the barratry of the master and mariners, and assigns the breach in a loss *per fraudem et negligentiam* of the master. Judgment *pro quer.* in C. B. and the general errors assigned. It was objected in this court, that the fraud and negligence of the master was not within the meaning of the policy, being more general than the word barratry.

Or running away with her;

Per Cur. The negligence, certainly, is not confined barely to the running away with the ship. It comes from *barat*, which signifies *fraud*, and *dolus*, and extends to any fraud of the master. The end of insuring is to be safe in all events; and it would be very prejudicial if we were to be making loopholes to get out of these policies. The insurer knows the master, and whether he can trust him; and he that insures against his running away with the ship, never imagined he might or would be guilty of any other fraud. Judgment affirmed.

3. LOCKYER v. OFFLEY. E. T. 1798. K. B. 1 T. R. 252. S. P. HOVELLOCK v. HONCELL. H. T. 1799. K. B. 3 T. R. 277.

The master in the course of the voyage committed barratry, by smuggling, on his own account, by having, and running brandy on shore in casks, under sixty gallons; and the ship afterwards arrived at the port of destination, and was there moored at anchor twenty-four hours in safety; after which she was seized by the revenue officers for the smuggling. It was holden that the underwriter was discharged.

Or by smuggling.

4. STAMMA v. BROWN. E. T. 1772. K. B. 2 Stra. 1173.

The ship, the Gothic Lion, being advertised to be going to Marseilles, goods were shipped on board her, on behalf of the plaintiff, and a bill of lading sign-

It has been said that

barratry cannot be committed in respect of an act done for the owner's benefit.

[268]

ed by the master, whereby he undertakes to go a direct route to Marseilles, and the defendant underwrote a policy from Falmouth (where the goods were taken in) to Marseilles; before the ship departed from the port of London, another advertisement was published for goods to Genoa, Leghorn, and Naples; and the plaintiff's agent was told it was intended to go to those ports first, and then come back to Marseilles; but he insisted that his bargain was to go first or directly to Marseilles, and he would not consent to let her pass by Marseilles, or alter his insurance. The ship, however, did pass by Marseilles, and after delivering her cargo at the other ports, set out on her return to Marseilles, with the plaintiff's goods, but in her voyage thither was blown up in an engagement with a Spanish ship. And in an action upon the policy, the breach was assigned as a loss by the barratry of the master; and the plaintiff insisted that any fraud or malversation of the master was within the meaning of the word barratry. Dupeane terms it *dolus qui fit in contractibus*; and so do all the dictionaries, as Florio's Italian Dictionary, *verbo barrataria*; Minshew, Furetier, &c. And that in the case of Knight v. Cambridge and Knight v. Dodd, 10 Geo. 1. where the loss was laid to be *per fraudem* of the master, the court held it a good assignment of a breach, there being the word barratry in the policy. The defendant's counsel insisted this was no more than a deviation, in which case the insurer is discharged, and the plaintiff's remedy is against the owners or master; that this cannot be called a crime in the master, when he is acting all the while for the benefit of his owners. The Chief Justice, in his direction to the jury, told them, that this being against the express agreement to go first to Marseilles, seemed to be more than a common deviation, being a formed design to deceive the contractor, and compared it to the case of sailing out of port without paying duties, whereby the ship was subjected to forfeiture, and which has been held to be barratry. And a new trial being moved for, the case was argued, and all the Court was of opinion that the verdict was right; for the master has acted consistent with his duty to his owners, and the plaintiff's agent knew of the intended alteration before the goods were put on board, and might have refused to ship them, or have altered the insurance; that to make it barratry there must be something of a criminal nature as well as a breach of contract; and that here the breach being assigned only on the barratry, was not supported by the evidence. So, the defendant had judgment.

5. Moss v. BYROM. T. T. 1795. K. B. 6 T. R. 379.

The master, under letters of marque (which, for want of a certificate, were not valid, and which had been put on board by the owners with a view to encourage seamen to enter, and without any intention of their being used for the purpose of cruising), had cruised for and taken a prize, in consequence whereof the vessel was lost.

The criterion of barratry is whether the ship owners would be liable to the freight or from the alleged misconduct of the captain;

Per Cur. Three points have been made in this case; 1st. That the risk was varied in consequence of the letter of marque being taken on board, and that that put an end to the policy. 2ndly. That this was not barratry. And 3dly. That the account given by the plaintiffs of the reason for taking out the letters of marque ought not to have been believed; but the last was a question for the jury alone to decide. As to the second, there is no doubt but that there was barratry against the owners. According to the terms of the charter-party the ship was to proceed directly to Liverpool; and whatever was done by the captain to defeat or delay the performance of the voyage was barratry in him, it being to the prejudice of his owners. And though the captain might conceive that what he did was for the benefit of his owners, yet, if he acted contrary to his duty to them, it was barratry. When, therefore, he stopped the American ship to examine and to plunder her, he was guilty of barratry against his owners; because, if any loss or accident had happened to the ship during that time, his owners would have been responsible for it to the freighter of the ship. With regard to the first point, the case of Denison v. Modigliani, 5 T. R. 580. is distinguishable from the present, for the reason we have given, namely, that in that case there was a legal letter of marque on board to enable the captain to take prizes; but here the let-

for of marque was not obtained for the purpose of enabling the ship to cruise, but of procuring seamen on board; when the seamen were procured, the letter of marque ceased to have its effect, and then it was the same as if there had been no letter of marque on board at all. If the captain, having this letter of marque, did any act which increased the risk, that comes within the second point, namely, barratry; but if he had it on board without increasing the risk, that does not affect the policy. The circumstances, then the conduct of both parties, showed that it was their mutual understanding that the letter of marque should not be put on board the vessel. [269]

6. *PRYN V. ROYAL CANAL ASSURANCE COMPANY*. E. T. 1800. K. B. 7 T. R. 505.

In this case the Court of King's Bench, after considerable argument, were unanimously of opinion that there must be fraud to constitute barratry, and that the jury by negating fraud had, in truth, by that finding negated barratry. *As some branch of trust in the master as malefactor.*

7. *NUTT V. BORDREN*. H. T. 1790. K. B. 1 T. R. 323.

Action on a policy of insurance, made by Haque, before he became a bankrupt, on goods laden in the ship *Rachitte*, otherwise the *Bellona*, for a voyage from London to Rochelle, subscribed by the defendant for 120*l.* at 1*l.* 10*s.* per cent. premium. The cause was tried at Guildhall, before Mr. Justice Buller, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case: that the bankrupt shipped on board the vessel in question goods to the amount of 1,800*l.* for Rochelle; that the captain, by the instigation and direction of Messrs. Le Grands, the owners of the ship, went with the ship and cargo to Bourdeaux instead of Rochelle, where the cargo was sold by the agent of Le Grands; that a petition was presented by the plaintiffs to the Lieutenant-General of the Admiralty of Guienne, stating the whole of the transaction between the bankrupt and the owners and captain; that in order to procure a landing at Bourdeaux, their original destination being to Rochelle, false bills of lading were made out by the captain; at the instigation of Le Grand, the petitioner, a decree was passed, declaring Renne Guine, captain, guilty of the crime of barratry of the master, for having signed false bills of lading, &c., for reparation whereof it sentenced him to perpetual service in the galleys. It also declared Dominique Le Grand guilty, and convicted of having been an instigator and accomplice of the said barratry of the master, and adjudged him to five years' servitude in the galleys; and also decreed that the said Renne Guine and Le Grand should pay to the plaintiffs the amount of their loss, and all charges and costs. The question on this case is, whether the plaintiffs were entitled to recover against the insurers? After the first argument, Lord Mansfield said that, with regard to the sentence which had been passed abroad, and which had declared the master and owner to have been guilty of barratry, it was entirely out of the question. That though it was a most righteous judgment, yet that it was no part of the consideration of the Court there what was meant by barratry in an English policy. The question was left entirely open. That their idea of barratry was manifestly different from the construction put upon that word in our own courts; for they had found the owner guilty of barratry, which was entirely repugnant to every definition of barratry which had ever been laid down in an English court of justice. A few days afterwards the Court declared that they had not the smallest doubt as to the present question, and therefore thought it very unnecessary to hear a second argument. Hence, a shipowner can never commit barratry; [270]

8. *EARLE V. ROWCROFT*. H. T. 1808. K. B. 8 East, 126.

This was an action on a policy of insurance, at and from Liverpool to the coast of Africa, during her stay and trade there, and to the port of sale in the West Indies; and the plaintiffs averred the loss to be by barratry of the master. It appeared in evidence that the master, who was also supercargo, on his arrival off Cape Coast Castle, a British settlement on the coast of Africa, let go an anchor, and began to trade for two days there; but receiving intelligence that he could barter for slaves more expeditiously and advantageously at D'El- But an intention to injure the owner is not essential.

mina, a Dutch fort, about seven miles to windward, he weighed anchor and proceeded to this latter place, which had the Dutch flag flying and guns mounted, where he exchanged his goods, consisting, amongst other things, of muskets and gunpowder, with the Dutch governor and another resident there, for slaves. Holland was at that time at war with Great Britain, and he had a letter of marque on board against the French and Dutch. After taking on board a number of slaves, the captain, who was then on shore at D'Elmina, receiving information that an English frigate was in sight, sent a note on board to his own ship, directing her to sail immediately to Cape Coast, to prevent mischief, as he expressed himself; but before she reached Cape Coast, she was pursued and captured by the English frigate, and condemned for having traded with the enemy. It further appeared, that it had been usual to keep up a trading intercourse in boats and small craft, between the English and Dutch settlements on this coast, even in time of war between the mother countries, and that the captain's object in going to D'Elmina was to complete his cargo as cheaply and expeditiously as he could. It was admitted, that he had no particular instructions to go there, but that he was directed generally to make the best purchase, with dispatch. It was also proved, that when the ship was about to go to D'Elmina, the surgeon asked the captain if there was no impropriety in going there, to which he answered, that they should be soon gone and nobody would know it; and also, that besides his usual pay a captain, he had a commission on purchases and sales, which he was entitled to receive at the end of the voyage. Lord Ellenborough, at the trial, was of opinion, that this trading with the enemy by the captain, without the authority of his owners, though intended principally for their benefit, being in contravention of his duty to them, and subjecting their property to confiscation, was barratry; but as the case was new in specie, his lordship gave the defendant leave to move to enter a nonsuit. A motion having accordingly been made for that purpose, it was insisted by the counsel for the defendant that the act done must be a breach of trust, and done *ex maleficio*, and that here the obvious motive of the act was to make the speediest and cheapest purchases for his employers. After the argument, the Chief Justice said, the Court would look into the cases, but added, "I cannot refrain from making a few observations now. It has been asked, how is this act of the captain in going to D'Elmina, in order to purchase the cargo for his owners more cheaply and expeditiously, a breach of trust as between him and them? Now I conceive that the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners, where they give any, and where his instructions are silent he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage, because, in the absence of express orders to the contrary, obedience to the law is implied in their instructions. I cannot, therefore, for a moment suffer it to be supposed, that a captain is not guilty of a breach of trust to his owners, who, in contravention of the law, the observance of which, nothing being expressed to the contrary, is implied in their orders, does an act which is injurious to them." And of that opinion were the Court.

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9. *SLOMAN v. BROWN*. E. T. 1783. K. B. 2 Stra. 1173.

Policy on goods, where the goods were shipped under a bill of lading, which specified that the vessel should proceed a chartered route to Marseilles; but before the ship sailed her destination was altered, and instead of proceeding to Marseilles, she was dispatched on a voyage to London first, and afterwards to Marseilles, the owner of the goods being apprised of that fact, and requested to get an insurance which he had effected on his goods altered accordingly.

Lord Chief Justice Lee held, that the departure from the voyage specified in the bill of lading did not constitute barratry; for there was nothing of a criminal nature, but only a breach of contract. See Cowp. 153; 8 East, 136.

10. *TODD v. RITCHIE*. H. T. 1816. N. P. 1 Stark. 240.

Action on a policy of insurance. In one count of the declaration the loss was alleged to have arisen from the barratry of the master. After the vessel

However, a mere breach of contract on the part of the master does not constitute barratry.

So the improper treatment of the vessel by the master

had left Quebec with her homeward cargo on board, she sprung aleak, and the captain put into Gaspe, in the Gulph of St. Lawrence, and before any survey had taken place, he broke up her ceiling and end bows with crow-bars, in consequence of which the ship was much injured and weakened. This it was suggested was done in order to procure the condemnation of the vessel.

Lord Ellenborough. In order to constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment; as the case stands there is a whole ocean between you and barratry. See 5 B. & C. 212.

11. TOULMIN v. ANDERSON. E. T. 1808. C. P. 1 Taunt. 227.

This case arose upon a contract of insurance. The policy was upon a voyage from the Cape of Good Hope to Buenos Ayres. The defendant alleges that a loss has been occasioned by the barratry of the mariners. The loss being clearly proved to have happened, and all the evidence having been produced which is necessary to entitle the plaintiff to recover, and the jury being of opinion upon the facts that he ought to recover, several objections have been made for the purpose of setting aside their verdict, and entering a nonsuit.

Per Cur. First, much stress has been laid on the taking on board of three Spanish prisoners of war, who were on their parole, and who, as it appears, were taken on board by the permission of the governor, then residing at the Cape, and for the purpose of being delivered up to the English commander-in-chief in South America, in order to be exchanged for English prisoners. The foundation of this objection is, that the taking these three prisoners on board altered the risk of the underwriters, and consequently put an end to the contract of insurance; but as to this, we have no medium through which we can form a judgment of what might be expected or what was likely to be the consequence. In many cases the taking three such persons on board might be a great use. It is much the practice for vessels to approach an enemy's coast with a prisoner or two on board, under a pretended flag of truce. It was suspected that these prisoners were the authors of the mutiny, but it was not proved. As it is not shown that the giving a passage to these persons must necessarily increase the risk, we can form no judgment on this head. The question was properly left to the jury; and they thought that the risk was not thereby increased; the objection, therefore, can have no weight here.

12. PEPAN. v. COPE. T. T. 1808. N. P. 1 Campb. 434.

The acts of barratry relied upon were constituted by the taking of smuggled goods on board the ship. Upon her return to Weymouth, soon after the policy was effected, considerable quantities of spirits and tobacco were found concealed in different parts of her, which had been placed there by the sailors without the knowledge of the plaintiff: she was seized in consequence, but was afterwards liberated on satisfaction being made to the seizing officers. She again sailed with a fresh crew, who were admonished to beware of any infraction of the revenue laws. Notwithstanding this, they took large parcels of salt on board at Jersey, which, being afterwards discovered, the vessel was seized a second time. However, she was released as before, and made another trip. As soon as she returned she was seized a third time, for having spirits and tobacco on board which had been secretly stowed away by the mar-

* When the owner of a ship by his contract places the entire vessel for a time under the sole control of the freighter, during that time any act of the owner of the vessel done in the underfrand of the freighter is an act of barratry; see Soares v. Thornton, 7 Taunt. 627; S. C. writers are 1 Moore, 378.

† The underwriter of an insurance made by and in favour of the shipowner is not discharged by barratry committed with the privity of the freighter, unless he can show that the shipowner was also privy; see Bonflower v. Wilmer, 2 Selw. N. P. 980. Whether the loss happens in the act of barratry, that is, during a barratrous and fraudulent deviation, or afterwards, is not material; see Roscoe v. Corson, 8 Taunt. 684. So where a ship and cargo were carried barratrously by the master out of the course of the voyage and the ship and part of the cargo were sold, and the remainder sent home by a strange ship, held that this was a total loss of the cargo from the time of committing the act of barratry, and that the underwriters were liable for such loss, with benefit of salvage only; 1 D. & R. 207; 5 B. & A. 597.

[273] iners. Whilst she lay under seizure on this occasion in Weymouth harbour, another ship was driven against her by the force of the tide, and did her considerable damage. A petition to the Board of Customs was in the mean time presented by the plaintiff, stating his entire ignorance of these smuggling transactions, and the ship was once more restored to him on the usual terms. His demand against the underwriters was made up of the sums given to procure these restitutions, and the sum laid out in repairing the vessel from the damage she had sustained.

Lord Ellenborough. I can conceive that, as by captures in the warranty, hostile captures are evidently meant, so by seizures, must be understood seizures *ejusdem generis*. But this is a clear case of *crassa negligentia* on the part of the assured. It was the plaintiff's duty to have prevented these repeated acts of smuggling by the crew. By his neglecting to do so, and allowing the risk to be so monstrously enhanced, the underwriters are discharged; nor can he recover for the repairs, the ship being under seizure when she was run foul of; he had then ceased to have any property in her. If a vessel is seized *pro justa causa*, the property is immediately vested in the crown. This is different from Lord Keith's case, where the ship had been unjustly seized, and the property was not considered to have been divested from the owner; 2 East, 260. Here giving back the ship was an indulgence, and, after such continued negligence on the part of the plaintiff, rather an extraordinary one. Plaintiff nonsuited.

13. EVERETH v. HARRISON. M. T. 1815. C. P. 6 Taunt. 375. 2 Marsh, 72.

Where the master of a vessel condemned for a breach of blockade swore he was bound for another destination, held that this did not so disaffirm his owner's privity to [274] the breach of blockade as to enable the plaintiff to recover as for a loss by barratry.*

Action on a policy of insurance. The captain of the *Wilhelmina*, on the part of the plaintiff, stated that the ship sailed from Aarhus, in Jutland, with a cargo of corn, bound for Leith, on the 26th of May, 1814; that he was pursuing his direct course for Leith, as far as the wind and currents would permit, without any other object or intention; that the currents carried him nearer than he intended to Norway, which was then under blockade by the Swedish government; and that on the 30th of May, the ship being then about five German miles from Absendahl, on the coast of Norway, was taken by the Swedish frigate *Eurydice*, and carried into Gottenburgh. On the part of the defendant, the sentence of condemnation by the Swedish Court of Admiralty was produced, which stated that, from the situation in which the *Wilhelmina* was found, "it clearly appeared that the captain had endeavoured to enter a port of Norway, and on that ground the condemnation proceeded." It was then contended for the plaintiffs, that the sentence, if it proved the breach of the blockade, also proved barratry on the part of the captain, since it appeared that the ship was bound by the owners for Leith; and that the defendant could not set up as a defence a loss by seizure; that that seizure was authorized by the barratrous act of the captain; when the same evidence would entitle the plaintiffs to recover as for barratry. A verdict was found for the plaintiffs, the Chief Justice reserving three points for the consideration of the court: 1st. Whether the sentence was conclusive evidence of the breach of the blockade, so as to preclude the plaintiffs from recovering? 2dly. Whether the sentence, coupled with the testimony of the captain, that the ship was bound for Leith, were also conclusive evidence of barratry? And 3dly. Whether, if it were, the plaintiffs would be entitled to recover on that ground, without a count for barratry?

Per Cur. The plaintiffs commenced their case by calling the captain, who stated he was bound for Leith; that he pursued that course as far as he was able; and that he was taken about five German miles from the coast of Norway by a Swedish frigate: so far the plaintiffs would have been entitled to recover; but then the defendant gave in evidence the sentence of condemnation, by which it appeared that the ship had broken the blockade and had been violated; yet, taking it with the captain's evidence, that the owners had given

* Where prisoners of war rose in the ship and confined all of the crew except one, who was heard on the deck in conversation with them, this was considered evidence of barratry to go to the jury; *see Hathi v. Thorsen*. Holt, N. P. c. 80.

him instructions to proceed to Leith, that violation must be considered as an act of barratry on his part. Thus much of his evidence they are desirous of receiving; but they wish to reject the rest, as being contradicted by the sentence of condemnation. The Court are accordingly desired to conclude from the captain's evidence, that his directions were to go to Leith; and from the sentence, that he had committed a breach of the blockade, which, it is contended, was an act of barratry on his part. Even supposing the law to be as the plaintiffs contend, we are of opinion that the evidence did not warrant it; and that it required much more inquiry, even on that principle, to fix the captain with barratry. That cannot be done, unless he act criminally; and to say, that he broke the blockade in disobedience to the instructions of his owners, for some private interest of his own, is too strong an inference from the evidence as it stands. The ship might have been bound for Leith, and yet might have received directions to touch at Norway; and for other reasons she might have gone thither without any imputation of barratry. On this ground, therefore, we are of opinion that the plaintiffs cannot resort to their claim for barratry. We do not decide whether they could or could not have done so on the present declaration, supposing the facts had borne them out, nor whether, in an action against the underwriters for the barratry of the master, the sentence of condemnation be so conclusive as to preclude any other evidence from being received to rebut it. We only decide that the facts of this do not afford sufficient evidence of barratry. Rule absolute. See Barnes, 212.

14. TOULMIN v. INGLIS. T. T. 1808. N. P. 1 Campb. 611.

Action on a policy of insurance. The defence was, that the underwriters were discharged by the careless and negligent conduct of William Hopley, one of the assured, in taking aboard three Spanish prisoners who had stirred up the mutiny which terminated in the loss of the ship. A short time before the *Aderna* was to set sail three Spaniards at the Cape of Good Hope upon their parole, with the concurrence of Hopley, presented a memorial to Sir David Baird, the governor, praying for liberty to return to their relations and friends at Buenos Ayres by this vessel. The following answer was returned: "The memorialists may proceed in Mr. Hopley's vessel, but they must still be considered as prisoners of war, and deliver themselves over to Major-Gen. Beresford, to be exchanged for any British officers who may chance to be taken." The Spaniards were accordingly conveyed on board by Hopley, who went as supercargo. No intimation was given to the captain that they were prisoners of war, so that neither their persons nor their baggage were examined, and they were allowed the full range of the ship; the rest of the crew consisted chiefly of foreigners. The Spaniards had been at liberty at the Cape, and behaved in a manner to disarm all suspicion, till the mutiny broke out; this happened as the ship was going up the river Plate. The Spaniards were, at the time, suspected to be at the bottom of the plot, but they did not take a more active part in it than others who joined them, among whom were four Englishmen.

Lord Ellenborough. The question is, whether there has been here gross negligence in taking on board the three Spaniards? Did they materially enhance the risk? Every foreigner is more dangerous than a British subject; but it is not contended that the underwriters are discharged because the crew consisted in a great measure of foreigners. It is impossible to say that every thing which increases the risk vacates the insurance, or this effect would be produced by taking on board a barrel of gunpowder, or any other inflammable matter. These Spaniards were not considered as dangerous at the Cape, where they were allowed to walk about at large, and they were not ordered to be transported by this ship, but were permitted, at their own request, to return home, where they were to deliver themselves up to be exchanged for any British officers who by the fortune of war might have fallen into the hands of the enemy. It might reasonably have been conceived, that it was unnecessary under these circumstances to keep them in jealous custody, and that they might be safely constituted the guardians of their own honour. If there was

Under a declaration stating the loss to have been by perils of the sea, the [276] plaintiff may recover by showing that the ship was wrecked by the barratry of the master and mariners.

So, a count stating the loss to have been by capture is sustained by showing that it happened from a collusion between the master of the ship and the commander of the privateer. The insured are liable for losses occasioned by an accidental fire;

[277] And if the policy extend to fire and barratry of the master, they are liable for a loss accruing from the negligence of the master and mariners,

no culpable inattention in taking them on board, and nothing arose afterwards to excite suspicion of their intentions, the underwriters remain liable.

15. *HEYMAN v. PARISH*. E. T. 1809. N. P. 2 Campb. 149.

The defence was, that the loss had been occasioned by the misconduct of the captain. In support of this case, the pilot swore the captain sailed in a foul wind, contrary to his directions, having before refused to sail when the wind was fair; that in several other respects he disobeyed the witness's instructions, though informed of the consequences; and finally, that the ship having been stopped when going on shore by getting out an anchor, the captain cut the cable and allowed her to drift on the rocks.

Lord Ellenborough said, if the witness was to be believed, this was a clear case of barratry.

16. *ARCANGELO v. THOMPSON*. H. T. 1811. N. P. 2 Campb. 620.

Action on a policy of insurance. The ship was captured by a French privateer, carried into Venice, and there condemned, together with her cargo. This appeared to have happened through an agreement between the captain of the ship and the captain of the privateer. It was for the defendant objected that the loss was not proved as laid, and had not arisen from an hostile capture, but from the barratry of the master.

Lord Ellenborough. The plaintiff was no party to the barratrous agreement under which the ship was taken; as to him, the loss actually arose from capture. He might have recovered under a count laying the loss by barratry; but as the ship was actually taken by a French privateer; I think this declaration, laying by capture, is sustained by the evidence.

(g) *By fire.*

1. *MAPLES v. EAMES*. M. T. 1780. K. B. 2 Stra. 1243.

The ship *Success* was insured at and from Leghorn to the port of London, and till there moored twenty-four hours in good safety. She arrived on the 8th of July at Fresh Wharf, and moored, but was the same day served with an order to go back to the Haze to perform a fourteen days' quarantine. The men upon this deserted her; and on the 12th the captain applied to be excused going back, which petition was adjourned to the 28th, when the Regency ordered her back; and on the 30th she went back, performed the quarantine, and then sent up for orders to air the goods. But before she returned the ship was lost on the 23rd of August; and now the question was, whether the insurer was liable? For the defendant it was insisted, that the ship arriving and being moored on the 8th of July, and remaining so till the 30th, here was a performance of what he had undertaken, and his risk ought not to be extended to so long a time as between the 3th of July and the following 23d of August. But the Court ruled, that though the ship was so long at her mooring, yet she could not be said to be there in good safety, which must mean the opportunity of unloading and discharging, whereas here she was arrested within twenty-four hours, and the hands having deserted, and the Regency taken time to consider the petition, there was no default in the master or owners. And it was proved, that till the fourteen days were expired there could be no application to air the goods; wherefore the jury found for the plaintiff.

2. *BUSH v. ROYAL EXCHANGE ASSURANCE COMPANY*. M. T. 1818. K. B. 2 B. & A. 73.

In an action on a policy on a ship, by which amongst other risks the underwriters insured against fire and barratry of the master and mariners, it appeared the mate continued in charge of the ship till the 9th day of January following; on that day he lighted a fire in the ship's cabin; and in the evening, without leaving any body on board the *Carolina*, he went on board another Russian ship lying contiguous; there he remained for the night. At twelve at night he awoke, and went on the deck of the ship which he had joined; looking round he found every thing quiet, and went down again to bed. About four o'clock the following morning, he was alarmed by a fire which had broken out in the *Carolina*, and was then raging through the cabin windows, the round house, and on the main hatchway. In spite of all that could be done to ex-

tinguish the flames, the vessel was soon consumed to the water's edge. The loss arose from the negligence of the mate in lighting a fire in the cabin, and not seeing that it was properly extinguished. It was admitted that the ship would have been sufficiently protected during the winter, in the care of the mate, had he done his duty. The question for the opinion of the Court was, whether the defendants were exempted from their liability for the loss, on the ground of its having been occasioned by the negligence of the mate?

Per Cur. The policy expressly throws upon the underwriters the liability for all losses proceeding from fire, barratry of the master and mariners, and all other perils, losses, and misfortunes that should come to the hurt, detriment, or damage of the ship. The object of the assured certainly was to protect himself against all the risks incident to a marine adventure. The underwriter being therefore liable, *prima facie*, by the express terms of the policy, it lies upon him to discharge himself. Does he do so by showing that the fire arose from the negligence of the master and mariners? If the ship had been wilfully set on fire it would have been barratry, and the underwriters would be liable; but it has been argued that the underwriters are only liable for a loss by barratry, because that is one of the risks expressly mentioned in the policy; and that the negligence of the master and mariners not being a risk expressly described in the policy, the underwriters are not liable for a loss thereby occasioned. In this case, however, the loss is occasioned by fire, against which the assured is protected by the terms of the policy; and in our law, at least, there is no authority which says that the underwriters are not liable for a loss, the proximate cause of which is one of the enumerated risks, but the remote cause of which may be traced to the misconduct of the master or mariners. If, indeed, the negligence of the master would exonerate the underwriter from responsibility in case of a loss by fire, it would also do so in cases of loss by capture or of perils of the sea; and it would, therefore, constitute a good defence in an action upon a policy to show that the captain had misconducted himself in the navigation of the ship, or that he had not resisted an enemy to the utmost of his power. The fair result, therefore, of all the authorities is this, that the underwriters are liable for a loss by fire, occasioned by the negligence of the master and mariners, provided they insure against barratry, that term being by the French writers used in its larger sense, as comprehending negligence as well as wilful misconduct; but, inasmuch as the term *barratry* is used in our policies in a more limited sense, as applicable only to the wilful misconduct of the master or mariners, the authority of *Emerigon* affords no ground for our decision in this case. We must, therefore, endeavour to collect the meaning of the contracting parties from the terms of the policy itself; and, in considering whether the assured, claiming for a loss by fire, is to have that claim disallowed, on the ground that the fire was occasioned by the misconduct of the master, we must look to the other terms of the policy, and learn from them whether the assured in other instances, are responsible for the misconduct of the master; and if we find that they make themselves answerable for the wilful misconduct of the master in other cases, it is not too much to say, that they meant to indemnify the assured against fire proceeding from the negligence of the master and mariners. We are, therefore, of opinion in this case, that the assured are entitled to recover as for a loss by fire, although that fire was produced by the negligence of the person having the charge of the ship at the time.

3. *GORDON v. RIMMINGTON*. M. T. 1807. C. P. 1 Campb. 123.

In an action on a policy of insurance, where the loss was stated to be by fire, it appeared that the ship in question having been chased by an enemy of superior force, the captain, in order to prevent her from falling into the hands of the enemy, set her on fire. It was holden, that this loss was covered by the policy; Lord Ellenborough, C. J. observing, that if the ship is destroyed, it is immaterial whether it is occasioned by a common accident; or by lighting, or by an act done in duty to the state. Nor could it make any difference, ^{So, the underwriters are liable if the ship be fired by the captain to prevent her falling into an enemy's hands.*}

* Or she be burned by order of the state where she happens to be to prevent infection.

once whether the ship was thus destroyed by third persons, subjects of the King, or by the captain and crew, acting with loyalty and good faith. Fire was still the *causa causans*, and the loss within the perils insured against.

4. PELLY V. ROYAL EXCHANGE ASSURANCE COMPANY. E. T. 1757. K. B.

1 Burr. 341.

As it is a well known usage for China ships to carry and place their tackle in warehouse or bank-saul in Canton river, the insurers on a ship will be liable for a loss happening to her tackle by fire in the bank-saul.

Action of covenant upon a policy of insurance. The case stated that the plaintiff being part owner of the ship *Onslow*, an East India ship then lying in the Thames, and bound on a voyage to China, and back again to London, insured it at and from London to any ports or places beyond the Cape of Good Hope, and back to London, free from average, under ten per cent. upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the said ship, beginning the adventure upon the said ship from and immediately following the date of the policy, and so to continue and endure until the ship shall be arrived as above, and there anchored twenty-four hours in good safety. The perils mentioned in the policy were the common perils, viz. of the seas, men of war, fire, &c. The ship arrived in the river Canton, in China, where she was to stay to clean and refit, and for other purposes. Upon her arrival there the sails, yards, tackle, cables, rigging, apparel, and other furniture were, by the captain's order, taken out of her, and put into a warehouse or storehouse, called a bank-saul, built for that purpose on a sand bank or small island lying in the said river near one of the banks, called Bank Saul Island, in order to be there repaired, kept dry, and preserved till the ship should be keeled, cleaned, and refitted. Some time after this a fire broke out in the bank-saul belonging to a Swedish ship, and communicated itself to another bank-saul, and from thence to that belonging to the *Onslow*, and consumed it, together with all the sails, yards, &c. belonging to the *Onslow*, that were within. The case stated further, that it was the universal and well known usage, and has been so for a great number of years, for all European ships which go a China voyage, except Dutch ships, which for some years past have been denied this privilege by the Chinese, and who look upon such denial as a great loss, when they arrive near this Bank Saul Island, in the river Canton, to unrig the ships, and to take out their sails, yards, tackle, cables, rigging, apparel, and other furniture, and to put them on shore in a bank-saul, built for that purpose on the said island, in the manner that had been done by the captain of the *Onslow* on the present occasion, in order to be repaired, kept dry and preserved until the ships should be keeled, cleaned, and refitted. The case adds, that so doing is prudent, and for the common and general benefit of the owners of the ship, the insurers, and insured, and all persons concerned in the safety of the ship. The ship arrived from her said voyage in the Thames, having been again rigged and put in the best condition the nature of the place and circumstances of affairs would permit. The question for the opinion of the Court was, whether the insurers are liable to answer for this loss so happening upon the bank-saul, within the intent and meaning of this policy. The Court, after a solemn argument, took time to consider the question, and then Lord Mansfield delivered the unanimous opinion of the Court for the plaintiff.

Lord Mansfield. By the express words of the policy the defendants have insured the tackle, apparel, and other furniture of the *Onslow* from fire during the whole time of her voyage, until her return in safety to London, without any restriction. Her tackle, apparel, and furniture were inevitably burnt in China, during the voyage, before her return to London. The event then which has happened is a loss within the general words of the policy, and it is incumbent upon the defendant to show, from the manner in which this misfortune happened, or from other circumstances, that it ought to be construed a peril which they did not undertake to bear. If the chance be varied, or the voyage altered by the fault of the owner or master of the ship, the insurer ceases to be liable, because he is only understood to engage that the thing shall be done safe from fortuitous dangers, provided due means are used by the trader to obtain that end. But the master is not in fault, if what he did was

done in usual course, and for just reasons. The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it; every thing done in the usual course must have been foreseen and in contemplation; at the time he engaged, he took the risk upon a supposition that what was usual or necessary should be done. In general, what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy, and to make a part of it as much as if it were expressed. The usage being foreseen, is rather allowed to be done than what is left to the master's discretion upon unforeseen events; yet if the master *ex justa causa* go out of the way, the insurance continues. Upon these principles it is difficult to frame a question which can arise out of this case as stated. The only objection is, that they were burnt in a bank-saul, and not in the ship, upon land, not at sea, or upon water; and being appertinent to the ship, losses and dangers ashore could not be included. The answer is obvious; 1st. The words make no such distinction. 2ndly. The intent makes no such distinction. Many accidents might happen at land even to the ship. Suppose a hurricane to drive it a mile on shore, or an earthquake may have a like effect; suppose the ship to be burnt in a dry dock; or suppose accident to happen to the tackle upon land, taken from the ship, whilst accidentally and occasionally refitting, as on account of a hole in its bottom or other mischance. These are all possible cases. But what might arise from an accidental repair of the ship is not near so strong as a certain necessary consequence of the ordinary voyage which the parties could not but have in their direct and immediate contemplation. Here the defendants knew that the ship must be keeled, cleaned, and refitted in the river of Canton; they knew that the tackle would then be put in the bank-saul; they knew it was for the safety of the ship and prudent that they should be put there. Had it been an accidental necessity of refitting, the master might have justified taking them out of the ship *ex justa causa*; but describing the voyage is an express reference to the usual manner of making it as much as if every circumstance was mentioned. Was the chance varied by the fault of the master? It is impossible to impute any fault to him. Is this like a deviation? No; it is *ex justa causa*, which always excuses. Had the insurers in this case been asked whether the tackle should be put in the bank-saul, they must, for their own sakes, have insisted that it should; they would have had reason to complain if, from their not being put there, a misfortune had happened. In such a case, the master would have been to blame, and by his fault would have varied the chance. They have taken a price for standing in the plaintiff's place, as to any losses he might sustain in performing the several parts of the voyage, of which this was known and intended to be one; therefore, we are all of opinion that in every light and in every part of this case, in reason and justice, and within the words, intent, and meaning of this policy, and within the view and contemplation of the parties to the contract, the insurers are liable to answer for this loss.

5. *BOYD V. DUBOIS*. M. T. 1811. N. P. 3 Campb. 133.

The plaintiff's witnesses stated, that while the ship was lying at a place near Torbay, a fire broke out in the hold during the night, which consumed the greatest part of the cargo, but the origin of which could not be discovered. The defendant's counsel undertook to prove that the hemp was damaged; that for this reason it was apt to ferment and take fire; that its condition had not been communicated to the underwriters; and that the fire actually had originated in the hemp itself. And they contended that, even if the last circumstance should not be satisfactorily made out, the underwriters would be discharged by the damaged state of the hemp not being communicated to them, since, had they been aware of that, they would have refused to subscribe to the policy. Lord Ellenbrough. If the hemp was put on board in a state liable to effervesce, and it did effervesce and generate the fire which consumed it, upon the common principles of insurance law, the assured cannot recover for a loss

If a fire arises on board a ship from the damaged quality of the goods insured, the underwriters are not liable; but if the loss is not so occasioned, the policy will not be violated by the non-disclosure of the condition of the goods to the insurer.

which he himself has occasioned. But I most positively say, that they were not bound to represent to the underwriters the state of the goods. It would introduce endless confusion and perpetual controversies if such a duty were to be imposed upon the assured.

A ship sunk in consequence of a British ship firing on her by mistake, is a loss within the part of the policy which applies to other losses.

So, where a merchant ship was taken in tow (by mistake) by a British ship of war, and was there by exposed to a tempestuous sea, which injured the goods on board, this was held a loss by perils of the sea.

(h) *By other perils.**

1. CULLEN v. BUTLER. M. T. 1768. K. B. 2 Solw. N. P. 930.

The master and crew of a British ship, believing the ship insured to be an enemy's ship about to attack them, fired at her and sunk her with the goods on board. This loss was specially set forth in the second count of the declaration; and the Court held, that the plaintiff was entitled to recover upon it, inasmuch as it fell within the general and comprehensive words in the policy subjoined to the particular causes of loss, viz. all other perils, losses, and misfortunes, which had or should come to the damage of the goods, ship, or any part thereof. See 1 Stark. 138; 5 M. & S. 461.

2. HAGEDOM v. WHITMORE. H. T. 1816. N. P. 1 Stark. 157.

A merchant ship (under a mistake) is taken in tow by a British ship of war, and is thereby exposed to a tempestuous sea, which injures goods on board of her. It was for the defendant contended, (and this was a loss within the terms of the policy, since it was attributed in the protest to the conduct of the captain of the Aggressor, who took the *Henrick* in tow,) this was *prima facie* a trespass on the part of the captain of the Aggressor; and although he, under the circumstances, might probably have justified, this could make no difference in the case as between the assured and the underwriter, and the loss could not be considered as having been occasioned by the perils of the sea.

Lord Ellenborough. This is a loss by the perils of the sea. The ship is seized in consequence of a misrepresentation of her documents; the protest states, that the sea ran high, and that the vessel shipped a great deal of water, and therefore the damage was occasioned by the perils of the sea, although the apprehension of seizure, and the circumstance of her being towed by the Aggressor, laid the vessel open to this peril. The loss might have been occasioned by capture and detention (see 2 Ld. Raym. 840; Salk. 244; 1 T. R. 6.) since it was not occasioned by the act of an individual, but by the captain of one of his Majesty's ships; but the present allegation is sufficient, since, by the act of capture, the vessel was divested of all self-command and power of protection, and exposed to those perils of the sea which in fact did attach.

See particularly 3 B. & A. 492; 1 Campb. 132; 5 B. & A. 161; 4 B. & G. 394.

(O) RELATIVE TO WARRANTIES.†

1. *In general.*

(a) *What is.*

1. BEAN v. STUPART. M. T. 1738. K. B. Doug. 11.

A stipula

The plaintiff insured the ship called the *Martha*, at and from London to

* The specification of perils in a policy of insurance is followed by general words, by which the underwriters take upon themselves all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the ship or goods in the voyage. The effect of these words is to remove doubts which might otherwise have arisen with respect to the precise import of the enumerated perils, and to extend the liability of the underwriters to cases which come very nearly, though not precisely, within the specific causes of loss.

† A warranty is a stipulation or agreement on the part of the insured, in the nature of a condition precedent. It may be either affirmative, as where the insured undertakes for the truth of some positive allegation, as that the thing insured is neutral property, that the ship is of such a force, that she sailed or was well on such a day, &c.; or it may be promissory, as where the assured undertakes to perform some executory stipulations, as that a ship shall sail by or before some given day, that she shall depart with convoy, that she shall be manned with such a complement of men, &c. Warranties are either express or implied. An express warranty is a particular stipulation, introduced into the written contract by the agreement of the parties, as that the thing insured is neutral property, that the ship shall sail by a given day, that she shall depart with convoy, &c.; an express warranty being of the nature of a condition precedent, the Courts have held that it must appear on the face of the policy, in order that there may be indisputable evidence of a stipulation, the non-compliance with which must necessarily avoid the contract.

New-York, the voyage to commence from a day specified; and on the margin of the policy was written these words: 'Eight nine-pounders, with close quarters, six six-pounders on her upper decks, thirty seamen besides passengers.' The ship sailed from the Downs on the 1st of March, and was taken on the 10th by an American privateer, and was sent, with a prizemaster on board, to make the port of Boston. On the 30th of May, the plaintiff brought this action against Stupart, an underwriter on the policy, on which Stupart paid the premium into court, and pleaded the general issue. About the 6th of July, and before the trial, accounts were received that the ship had been retaken some time in May and carried into Halifax. The cause came on for trial before Lord Mansfield and a special jury, at Guildhall, at the sittings after Trinity term, 18 Geo. 3. The defence set up was, that there were not thirty seamen on board the ship, according to the terms of the stipulation in the margin of the policy; and, in fact, it appeared upon the evidence, that, to make up the number, the plaintiff reckoned the steward, cook, surgeon, some boys and apprentices, and some persons described as men learning to be seamen; and that only twenty-six persons had signed the ship's articles. It also appeared, that there were seven or eight passengers on board. It was, for the defendant, contended that this was a warranty, not a representation, and that, being so, it must be literally and strictly complied with.

Lord Mansfield. The whole argument for the defendant turns upon begging the question. There is no doubt but that this is a warranty; its being written in the margin makes no difference. Being a warranty, there is no doubt but that the underwriters would not be liable if it were not complied with, because it is a condition on which the contract is founded. But the question is, whether, in this warranty, the word "seamen" was used in the strict literal sense or not? If it was, the warranty has not been complied with. It is a matter of construction; boys are reckoned seamen, not only at the Custom House at Greenwich Hospital, but in the distribution of prizes. I think the parties were not sanguine at the trial; the special jury and the bystanders were perfectly clear; they hardly seemed to think it a serious question in this cause. There is scarcely now such a thing as a ship entirely manned with seamen, strictly so called; even on board the King's ships they are satisfied with a few strict seamen, and able-bodied landmen make up the rest of the crew. I had no doubt of the sense of the word in this policy, and the jury decided it. With regard to the other question, it was stated as a forlorn hope; but certainly, when the action was brought, there was no prospect of a recapture of the ship; she was considered as totally lost, in a remote part of the world. The report which afterwards prevailed of her being retaken, some months after the capture, was loose and general; no circumstances known, no accounts of her situation, nor of what part of the cargo might be saved. In short, there is no doubt but that it was a case where the owner might abandon. Rule discharged.

2. *PAWSON v. EWER*. M. T. 1778. K. B. Doug. 12. n. S. P. Bize v.

FLETCHER. E. T. 1778. K. B. Id. 13. n.

Motion for a new trial. The case was shortly this: the broker who made the insurance showed to some of the underwriters a paper detached from the policy, containing instructions relative to the force the ship was to sail with, viz. twelve guns and twenty men. There were no guns or men on board when the policy was subscribed. Mr. Thornton, the first underwriter on the policy, had seen the paper, and he had paid; Watson and Snell had not seen it; Ewer, who had subscribed after them, had; but they all underwrote at the same premium, which was proved to be the premium for such a vessel as that in question, when sailing without force. The ship actually sailed with only ten guns, four-pounders, and six swivels, and with only sixteen men and seven boys, besides passengers. It was proved that boys are entered on the ship's books and considered on ship-board as men, and that ten guns and six swivels are of greater force than twelve guns; that upon the whole, the ship was of more force than she would have been if the written instructions had been spe-

tion, though written in the margin of the policy, is a warranty;

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But if on a separate paper, though pinned or wafered to the policy, it is only a representation

[284] officially adhered to. There were verdicts for the plaintiffs; but on a motion for a new trial in one of the causes, which was to determine the rest, it was contended, on the part of the defendant, that the instructions shown to the first underwriter, upon whom, in general, all the others rely, being in writing, were to be considered as a warranty, which must be strictly complied with, and that it had not been complied with in this case. The counsel for the plaintiff, on the contrary, maintained, in the first place, that the written paper, being separate from the policy, was only a representation, and that it was sufficient to comply with it in substance, or to do what was equally beneficial to the underwriters; but, in the second place, that the terms had been strictly complied with, for that swivels were a species of guns, and that boys, in the maritime sense, were reckoned men or seamen, as opposed to passengers. The Court were of opinion that the word "men" in the marine language does include boys, but they chiefly went upon the distinction between a warranty and a representation, and held that in this case the instructions, though in writing, yet being on a separate paper from the policy, were only a representation, and as they had not been departed from fraudulently, nor in a manner detrimental to the underwriters, the policy was in force against them.

3. *DE HAHN V. HARTLEY*. T. T. 1786. K. B. 1 T. R. 343; S. C. 2 id. 186.

Whatever is written in the margin of a policy to be deemed part of that instrument.

The defendant, on the 14th of June, 1779, gave to his insurance broker instructions in writing, to cause an insurance to be made on a certain vessel called the *Juno*. Then the instructions are set out in the verdict signed by the defendant; the verdict then states that the broker, in consequence of such instructions, on the said 14th of June, 1779, did cause a policy of insurance to be made on the *Juno*, upon goods and merchandizes laden on board, and also on the ship, at and from Africa to her port or ports of discharge in the British West Indies, at and after the rate of 15*l.* per cent. The verdict, after reciting two memoranda not material, then proceeded to state, that in the margin of the said policy were written the words and figures following: "sailed from Liverpool with fourteen six-pounders, swivels, small arms, and fifty hands or upwards; copper sheathed;" that the plaintiff underwrote the policy for 200*l.* at a premium of 3*l.* 10*s.*; that the *Juno* sailed from Liverpool on the 13th of October, 1778, having then only forty-six hands on board her, and arrived at Beaumaris, in the isle of Anglesea, in six hours after her sailing from Liverpool, with the pilot from Liverpool on board her, who did pilot her to Beaumaris on her said voyage; and that at Beaumaris the *Juno* took in six hands more, and then had and during the said voyage, until the capture thereof, continued to have fifty-two hands on board her; that the said ship in the voyage from Liverpool to Beaumaris until and when she took in the said six additional hands was equally safe as if she had had fifty hands on board her that part of the voyage. The verdict then states that the defendant was interested, and that the ship was captured; that on receiving an account of the loss of the vessel, the plaintiff paid to the defendant the sum of 200*l.*, not having then had any notice that the said ship had only forty-six hands on board her when she sailed from Liverpool.

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Per Cur. It is impossible to divide the words written in the margin in the manner which has been attempted at the bar, that that part which relates to the copper sheathing should be a warranty, and not the remaining part. But the whole forms one entire contract, and must be complied with throughout. Judgment for the plaintiff. A writ of error was brought in the Exchequer chamber upon this judgment, which after two arguments was affirmed by the unanimous opinion of the eight judges composing that Court.

(b) *Construction of.*

1. *DE HAHN V. HARTLEY*. T. T. 1786. K. B. 1 T. R. 343; S. C. 2 id. 360.

S. P. PARSON V. WATSON. E. T. 1778. K. B. Cowp. 785.

There is a marked distinction between a

Per Cur. There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered; but a warranty must be strictly complied with. Supposing a warranty to sail on the 1st of August, and the ship did not sail till the 2nd, the warranty would

not be complied with. A warranty in a policy of insurance is a condition in a warranty contingency, and unless that be performed, there is no contract. It is perfect- and a re- ly immaterial for what purpose a warranty is introduced; but, being insured, presenta- the contract does not exist unless it be literally complied with. Now in the tion: a re- present case the condition was the sailing of the ship with a certain number of presenta- tion is ful men, which not being complied with, the policy is void. filled if it be

equitably and substantially answered; but a warranty must be strictly and literally complied with;*

2. *BARK V. ROYAL EXCHANGE ASSURANCE COMPANY*. M. T. 1818. K. B. 2 B.

& A. 73.

Per Cur. The owner certainly is bound, in the first instance, to provide And where the ship with a competent crew, but he does not undertake for the conduct of the insured that crew in the subsequent part of the voyage. It is not disputed in this case, has once that the assured had provided a competent crew, and that at the time of the provided a loss the mate himself was sufficient for all the purposes required. There was sufficient crew, their therefore, a competent crew left in charge of the ship, and the implied warren- negligent ty has been complied with. The cases cited with reference to this point are neg- lence at quite beside the question. The case of *Law v. Hollingsworth*, 7 T. R. 160. the time of proceeded on the ground that the ship at the time of the loss had not on board the loss is a pilot required by the act of parliament; and in *Tait v. Levi*, 14 East, 481. no breach of the im there was a breach of the implied warranty to provide a master of competent plied war- ranty that skill. the ship

3. *BLOCKHURST V. COCHELL*. T. T. 1789. K. B. 3 T. R. 360.

In an action on a policy on goods, dated 9th of December, 1788, lost or not { 286 }
lost, warranted well this 9th day of December, 1788, it appeared that the war- should be ranty was at the foot of the policy; that the policy was underwritten between properly manned. the hours of one and three in the afternoon of the 9th of December; that the A warranty in a policy same morning. Upon a motion to set aside a nonsuit, which had been entered, lost or not

Lord Kenyon, Chief Justice, Ashhurst, Buller, and Grosse, Justices, were lost, that clearly of opinion, that the warranty was sufficiently complied with, if the ship the goods were in safety at any time that day; that the nature of a warranty goes to de- are well on termine the question; for, as it is a matter of indifference whether the thing the day of warranted be or be not material, and yet must be literally complied with, still, policy, is if it be complied with, that is enough; that there was good reason for inserting as- ished by these words, because they protected the underwriter from losses before that their being in safety at day, to which he would otherwise have been liable, as the policy was on the any time that day, goods from their lading; and thus too the words "lost or not lost." have also their operation. though the ship be lost on that day.

4. *MILLER V. THOMPSON*. H. T. 1811. N. P. 2 Campb. 610.

Action on a policy of insurance. The ship was Danish, and brought a car- Where an insurance is go of wines from Bordeaux. These she unloaded at Chatham. The captain declared to be on a likewise put on board there eight cases of British manufactured goods, which named quantity of wine, it together with his British papers, he stowed away in the bottom of the hold. does not a The ship then proceeded on her ulterior voyage, and, after touching at Got- mount to a tenburgh, she was captured by a French privateer, and carried into Dantzic. a warranty that the At first there appeared no evidence against her, and she would have escaped the underwriters were discharged by the eight cases of British manufactured goods taken on board at Chatham. The insurance was declared to be on the cargo wine consti- being 1031 hogsheds of wine. This amounted to a warranty that the whole car- cargo consisted of wine, and that no other goods should be taken on board. go, and that no oth-

Lord Ellenborough. I think the cargo does not mean the whole cargo, but merely that the insurance shall attach upon that part of the cargo which con- or goods shall be ta- sists of the 1031 hogsheds of wine. There was no warranty or representa- tion that this was French wine. The risk was not increased by other goods ken on board;

*But a warranty does not include any thing necessarily implied in it; therefore, a war- ranty that a ship should have twenty guns, does not mean that she should have the neces- sary complement of men to work the guns; see *Hyde v. Bruce*, 1 Marsh. Ins. 354

being put on board. The ship was not declared to be of any particular nation. There was nothing illegal in sending British goods to a Prussian port, and I do not think it was any contravention of the terms of the policy.

5. CLAPHORN v. CALAGON. E. T. 1813. N. P. 3 Campb. 382.

Nor does the effecting a policy on a ship in an English name amount to a warranty or representation on that she is English.

The policy was originally filled up "on the Three Sisters, at and from Cadiz and Seville to Liverpool." After it had been signed by the underwriters, the broker inserted the words "Tres Hermanas, or," and "both or either," several of the underwriters put their initials to the alteration; but the defendant refused to do so. When the broker effected the policy, he merely called the ship "The Three Sisters," without making any representation as to the country she belonged to. In point of fact she was originally a Dane, and was purchased by the bankrupt, a merchant at Liverpool. While at Seville, on the adventure in question, he changed her name to the Tres Hermanas, manned her with a Spanish crew, commanded by a Spanish captain, and put her under the Spanish flag. She was lost on the voyage home by the perils of the sea. On the part of the underwriters it was sworn, that if the ship, instead of being English, as her name in the policy denoted, had been known to be manned with Spanish seamen, and navigated as a Spanish ship, it would have made a difference of two per cent. in the premium. Lord Ellenborough, however, held, that under these circumstances the defendant was liable. The mere calling the ship by an English name, he said, could not amount to a warranty or representation that she was English; she might have been an American, or an English prize, preserving her original name; or a ship built on the continent, whose name was translated into English.

6. ——— v. WESTMORE. E. T. 1806. N. P. 6 Esp. 109.

When a ship is insured while securely moored in a certain harbour, she is warranted in changing her moorings within the same harbour.

At the time the policy was effected the ship was moored at Portsmouth, at a place called Deepwater; she was afterwards removed to Beach-head, where her bottom was cleaned and repaired, and afterwards she was put into dock at Mark's wharf, and safely moored; while she was there an accidental fire broke out and she was burned. It was objected, that the plaintiff could not recover, this not being a loss within the terms of the policy, which was on the ship while she remained moored in Portsmouth harbour, whereas by shifting her position so often the risk was increased; nor was it to be supposed that all places were of equal security, and the underwriters might have contemplated on the place where she lay when the policy was effected, as a place of greater security than any other.

Lord Ellenborough said, that he was of opinion the loss was within the terms of the policy. It appeared to him, that the risk insured against did not require the continuity of the state in which the ship was when the policy was effected, and that the terms of the policy warranted a removal from place to place within the harbour of Portsmouth; and that such a change of place must have been in the contemplation of the parties. The loss did not arise from any fault in mooring of the vessel, but from another independent cause. And she had during the whole time remained in Portsmouth harbour.

7. WOOLMER v. MUILMAN. T. T. 1768. K. B. 1 Wm. Bla. 427. 3 Burr. 1419.

A false warranty in a policy of insurance will vitiate it, though the loss happens in a mode not affected by the falsity.

Action on a policy of insurance, dated 23rd of September, 1762, at and from North Bergen to London, at two guineas per cent. The ship, &c. were warranted to be neutral ship and property; but, in truth, the plaintiffs were British subjects, having interest on board to the amount of the sum insured. The ship foundered at sea, and the defendant now refused to pay the insurance on account of the untrue fact warranted by the plaintiff. This counsel for the plaintiff insisted that this warranty was only meant to secure the insurers against the perils of the enemies, and, therefore, was equivalent to warranty free from capture, and that the loss had happened in such manner as not to make the truth or falsehood of the warranty at all material. But by

Lord Mansfield, C. J. The point is too clear to be argued. There was a falsehood in respect to the condition of the thing insured; therefore, it was no contract. Judgment for defendant.

2. In particular.

(a) Of sea worthiness.*

1. *ANNEN V. WOODMAN*. M. T. 1810. C. P. 3 Taunt. 299.

The vessel arrived at Surinam, and lay there a considerable time before she sailed, during which she took in a cargo of goods of the value of 6,000*l.*; she sailed on the homeward voyage on the 1st of August, 1808, but before she got down to Braam's point, at the mouth of the Surinam river, she grounded and was lost. The defence set up by the underwriters was, that the vessel was not sea-worthy; it was proved that the vessel broke ground without a sufficient complement of men for the voyage, and that she was leaky. The plaintiff endeavoured to show that the damage had been occasioned by accidentally striking on an anchor in the Surinam river; but some witnesses proved that the ship's timbers were rotten; whereupon the counsel for the plaintiff said he would admit she was not seaworthy, and would take his verdict only for a re-
Although it is a sufficient compliance with a warranty of seaworthiness, if the vessel be so whilst in port and before her departure,

Per Cur. The question is, whether on an insurance at and from Surinam, the facts of this case entitle the plaintiff to a return of premium? Now if the ship sailed without a sufficient number of men, certainly they do not. This case never went to the jury, but I believe they were perfectly clear on both grounds; as to the number of men they certainly were. But with respect to the other point, here is the ship kept a month at Surinam, in loading, and to all appearance, in the judgment of mankind, certainly seaworthy; and if she had been sunk or burnt there, the underwriters could have made no defence. And it would be very strange if this plaintiff can say, on its being proved that the ship was not seaworthy when she finally sailed; that, therefore, the seaworthiness shall be carried back to the time of her arrival at Surinam. Rule absolute for a nonsuit.

2. *WEIR V. ABERDEEN*. H. T. 1819. K. B. 2 B. & A. 320.

A ship insured at and from a port, sails on her voyage in an unseaworthy state, in consequence of having a greater cargo than she could safely carry. The defect is discovered before any loss accrued, and part of the cargo is discharged, and a loss subsequently accrues, in no degree attributable to her having been overladen in the early part of her voyage. The Court held that the underwriters were liable for such loss.
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 Yet a subsequent unseaworthiness will not affect the liability of the underwriters;

3. *FORBES V. WILSON, AND HIBBERT V. MARTIN*. E. T. 1800. K. B. 1 Park, Ins. 344.

Insurance was on the ship *Henry*, at and from Liverpool to the coast of Africa; and it appeared that at the time the policy was made the ship was not in a condition to go to sea, but was in fact at the time undergoing very material repairs; and it was contended by the underwriters, that as the risk descri-
A ship may be seaworthy in harbour in a state which would not be sufficient for a voyage.

* First, that the ship shall be seaworthy. In every insurance, whether on ship or goods, there is a warranty on the part of the insured, that the ship shall be seaworthy or, in other words, "light, staunch, and strong," and fit for the service in which for the present time she is engaged, which is presumed till the contrary appear; 3 Taunt. 299; 3 Dow. 23. If a ship have in an insufficient bottom, or unsound timbers, or is without knees, or proper tackle, she is not seaworthy; see 1 Dow. 32; 3 Dow. 57.

† It is no breach of this warranty, if the ship becomes unseaworthy after her departure on the voyage, though it will frequently be presumed that the ship was unseaworthy at the time of her departure if she becomes so during the voyage from no cause in particular, and especially if it becomes so very shortly after the commencement of the voyage; see 1 Dow. 336; 3 Dow. 24; 4 Dow. 269. As to the doctrine of seaworthiness in general, see Park. 335, 236. The age of a ship is not a proof of seaworthiness, but of weight in evidence; 1 Dow. 344.

‡ And in a subsequent case, 4 Esp. 25, Lord Kenyon held the same opinion. And in a still later case, when the case of *Forbes v. Wilson* was quoted, Lord Ellenborough said, "I agree with the doctrine of that case; it is quite sufficient if the state of the ship be commensurate to her then risk. There may be a state of seaworthiness sufficient while in harbour, and there is a state of seaworthiness for the voyage."

bed was at as well as from, if the ship was not seaworthy, from whatever cause, when the policy was effected, it was void; and that any repairs done afterwards, so as to make her completely seaworthy at the time of sailing, would not cure that defect. Lord Kenyon was of opinion that under the words "at" and "from," it is sufficient if the ship be seaworthy at the time of sailing; for from the nature of the thing the ship while at the place probably must be undergoing some repair. The plaintiffs had a verdict, and no motion was made to set it aside.

4. *LOW v. HOLLINGSWORTH*. II. T. 1797. K. B. 7 T. R. 160.

But the assured are not entitled to recover, unless they equip the ship with every thing necessary to her navigation during the voyage.

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The ship itself must not only be seaworthy, but she must have a sufficient crew of competent skill.

In an action on a policy of insurance on ship and goods from Stettin to London, in which the plaintiff declared upon a loss by reason of the vessel sinking before she had been moored twenty-four hours, in consequence of an anchor having been driven into her. It appeared that the captain had taken a pilot on board at Orfordness, on entering the river Thames, who quitted her at Halfway Reach; after which, and before she had come to her moorings higher up the river, the accident happened which occasioned the loss, and in consequence of which the vessel filled with water, before she had been moored twenty-four hours; but the precise time at which the damage was sustained within those limits, or by what particular default, was not ascertained; the captain had also left the ship before the time of the actual loss.

Per Cur. The underwriters are discharged. In this case the captain did not perform his duty, for he had no pilot on board at the time when the accident happened; and it is one of the things implied in contracts of this kind, that there shall be some person on board the ship apparently qualified to navigate her. If the underwriters had been previously informed that there would be no pilot on board during the ship's sailing up the river Thames, probably they would not have undertaken the risk. On the ground, therefore, that there was no pilot on board the vessel when the accident happened, we are of opinion that the underwriters are not responsible.

5. *FORSHAW v. CHABERT*. M. T. 1821. C. P. 6 Moore, 369; S. C. 3 B. & B. 158.

At the commencement of the voyage.

The captain having lost some of his outward-bound crew by sickness and desertion at Cuba, and finding it impossible there to engage ten men for Liverpool, sailed from Cuba with a crew composed of eight men engaged for Liverpool, and two for Montego Bay, in Jamaica. He then proceeded to and touched at Montego Bay, for the sole purpose of landing the two men, who refused to proceed further, and of procuring others to supply their place.— Having effected both these objects, he sailed from Montego Bay; and the ship while in the prosecution of her homeward voyage was lost. It was proved that ten was a sufficient crew to navigate such a vessel as the *Hope* to England, and that the captain had no fraudulent purpose in touching at Montego Bay. Some of the witnesses said the touching at Jamaica increased the risk, and others denied this. It was objected on the part of the defendant, that the alteration in the policy was material and rendered it void; that the touching at Montego Bay was a deviation; and that the ship having sailed from Cuba with an insufficient crew, was not seaworthy when she broke ground, eight men only being there engaged for England. But the jury found a verdict for the plaintiff, and that the captain put into Montego Bay for a justifiable cause, even though there had been no alteration in the policy.

Per Cur. We must decide on legal grounds; and the question then will be whether the ship was or was not seaworthy at the time of sailing? Here it must be observed, that the voyage insured was not a voyage from London to Cuba, and back again from Cuba to London, in other words a voyage out and home, but a voyage from Cuba to Liverpool, and that the words added to the policy were "with leave to call off Jamaica," thereby showing that, in the opinion of the party who added them, liberty to touch at Jamaica was not within the terms of the original contract. Now it is clear that a ship must be seaworthy at the time when she sails; the assured warrants that, and whatever physical necessities may interpose, he is not allowed to deviate from the strict

terms of his warranty. It is clear, too, that what was done by the captain in the present case, was done without fraud and for the best. He went from Cuba to Montego Bay for the sole purpose of procuring more men. Was he justified in doing this or not? If he had a sufficient crew for the voyage at Cuba, then this was an increase of the risk; he had no right to go circuitously; and the touching at Montego Bay would thus be a deviation without necessity. Take it the other way, that he had ten men, a sufficient crew for the voyage, but only eight of them engaged for Liverpool and two for Montego Bay, and that he went to Montego Bay to procure two others to supply the places of those who were to leave him; then the ship was not seaworthy when she sailed from Cuba, because the captain ought then to have had ten men for Liverpool, and not eight for Liverpool and two for Montego Bay. Either the ship was not seaworthy at the time of sailing, or there has been a deviation. The jury found that the captain put into Montego Bay for a justifiable cause, even though there had been no alteration in the policy; but we go on the circumstance, that the ship had not a sufficient crew at the time she sailed, and that the insurance had no inception, because the ship was not seaworthy at the time of sailing.

6. WEDDERBURN v. BELL. M. T. 1107. K. B. 1 Campb. 1.

Assumpsit on a policy of insurance. The defence rested on two grounds: A ship to be sea-worthy must be rendered as secure as possible from capture, as well as from the perils of the sea.* 1st. That the ship on the homeward-bound voyage was not properly equipped with sails; and 2ndly. That she had not a sufficient crew. It appeared in evidence that her sails to be used in stormy weather were in good condition; but that her main-top-gallant-sail and studding-sails, which are useful in light breezes, were extremely rotten, and almost quite unserviceable.

Lord Ellenborough. In an action of this kind the plaintiffs are bound to prove, not only that the ship was tight, staunch, and strong, but that she was properly equipped with sails and other stores, and that she was manned with a sufficient crew to navigate her on the voyage insured. These are conditions precedent to the policy attaching; and if they were not complied with, so that peril was enhanced, from whatever cause this might arise, and though no fraud was intended on the part of the assured, the underwriters may answer, "we are not liable." The hull of the ship, in this case, was sufficient and seaworthy; but it appears that when she left Jamaica her sails were highly defective. It is not enough that a ship is supplied with such sails as are essential to her safety from the perils of the sea, and which might enable her, if not intercepted, from at some period or other completing her voyage; a person who underwrites a policy upon her has a right to expect that she shall be so equipped with sails, that she may be able to keep up with the convoy, and get to her port of destination with reasonable expedition. She must be rendered as secure as possible from capture by the enemy, as well as from the dangers of the winds and waves.

7. LEA v. BEACH, and OLIVER v. COWLEY. M. T. 1762. K. B. 1 Park, Ins. 343; S. C. 1 Marsh, Ins. 153.

The plaintiff had purchased a ship, and, after having her surveyed by proper judges, he sent her into the dock, and there had her fully repaired; and the ship-builder was ready to swear that he effectually repaired her, as he thought, having done all that was required to make her a good ship; she then was taken into the government service, on which occasion she was, as usual, surveyed by the persons employed for the purpose; she sailed out of the Thames, and arrived at Portsmouth, but being very leaky with bad weather, the admiral ordered her to go in and undergo a survey there. This was done, and it was found on opening her, that some timbers near her keel were very bad, insomuch that she was condemned as insufficient to proceed. The plain-

* If a ship sail on a voyage, and in a day or two become leaky and founder, or is obliged to return to port, without any storm or visible or adequate cause to produce such an effect, the presumption is that she was not seaworthy when she sailed; see *Munro v. Vanshipper*, 1 Park, Ins. 373.

who knows nothing of the circumstance, and all the parties have acted bona fide. tiffs having insured her, applied to the underwriters for the loss; the defendant was one; and the plaintiff insisted he had, and could prove that he had, done every thing in his power to send her out sufficient and good, and that this defect was a latent cause not known to him, or discovered when she was surveyed, or in the dock repairing.

Lord Mansfield said, that it appeared that the ship had died a natural death, and received her death blow before the insurance commenced; and however innocent the plaintiff was, and however cautiously he had acted, the underwriters were equally innocent; and the implied warranty must and ought to have its effect, and the plaintiff must make the best of a bad bargain; he had the ship (defective as she was) not injured from any sea loss after the insurance was made.—The plaintiff was nonsuited.

(b) *Of neutrality.*

1. EDEN V. PARKINSON. T. T. 1781. K. B. Doug. 732.

Under a warranty, though the ship and cargo were neutral property, it is sufficient that they are so when the risk commences. The plaintiffs insured the ship, the Young Herman Hiddinga, and her cargo, "at and from L'Orient to Rotterdam, warranted a neutral ship and neutral property." The ship being captured in the course of her voyage by some English men-of-war, the plaintiffs brought this action against the defendant, one of the underwriters on the policy, stating in their declaration, that the defendant subscribed the policy on the 28th of November, 1788, and averring that the ship and cargo were at that time neutral property. The trial came on before Lord Mansfield, at Guildhall, at the sittings after last Easter term, when a verdict was found for the plaintiffs, subject to the opinion of the Court, on a case which set forth (as far as is material) as follows: The ship in question sailed from L'Orient, on the voyage insured, on the 11th of December, 1780, having the insured cargo on board, and both the ship and cargo were neutral property at the time of the ship's departure from L'Orient, and so continued until the 20th of December, 1780, on which day, hostilities having commenced between the English and the Dutch, the Dutch ceased to be a neutral power, and the ship and cargo ceased to be neutral property. They were taken on the 25th of December, 1780, and condemned as lawful prize in the Admiralty Court on the 19th of February, 1781. For the plaintiffs it was contended, that the warranty was complied with by the neutrality of the ship and cargo at the time when the voyage commenced.

Per Cur. It is a general principle laid down by Justice Blackstone, in his Commentaries, "That a warranty can only reach to things in being at the time of the warranty made, and not to things in future; as that a horse is sound at the buying him, not that he will be sound two years hence;" see Black. Com. 165. In the case of Woolmer v. Muilman, 3 Burr. 1419; S. C. 1 Blac. 427. where the warranty was in the same words as here, the judgment of the Court was for the defendant, because the ship and goods were not neutral from the first. There was no fraud upon the defendant in this case. The insurer is to inform himself of the probability of safety from the continuance of peace, as was laid down by Lord Mansfield in the case of Carter v. Boehm, 3 Burr. 1905. 1910; S. C. Blac. 593, 594. If, indeed, the property had ceased to be neutral by the act of the party himself, the case would have been different. But he is not answerable for the consequence of a war breaking out during the voyage. To make him so, express words ought to have been used; otherwise the construction is to be in the largest and most advantageous way for the insured, according to the principle of the decision in the case of Gordon v. Morley, 2 Stra. 1265. The plaintiff was ready to have proved, at the trial, that the premium at the time of this insurance would have been the same if the warranty had been "Dutch property," instead of "neutral property."

2. GONELS V. KENSINGTON. E. T. 1799. K. B. 8 T. R. 230.

A policy on a ship warranted neutral is avoid. Action on a policy on goods in the ship Dispatch, warranted Danish ship and property. The loss was alleged to be by capture. A sentence of a British court of admiralty was produced, stating that the said neutral ship Dispatch, with the cargo, being Danish property, had been, under the authority

of the law of nations and of war, and agreeably to existing treaties, stopped ^{ed} by the and detained by the commander of one of his Majesty's ships, and by him sent ^{ship after} towards the port of Mole, St. Nicholas, for the purpose of being legally exam- ^{wards so} ined, under the command of Barrett, a midshipman, and two men; and that on ^{conducting} the near approach to the port, the master, supercargo, and crew of the said ^{herself as} ship, had, in direct violation and breach of their neutrality as Danish subjects, ^{to forfeit} and contrary to the law of nations and the faith of treaties, forcibly rescued ^{her neu} and taken and kept possession thereof, till again captured by the French pri- ^{trality.} vateer, and she was again captured by one of his Majesty's ships; and the said neutral ship and cargo were therefore adjudged good prize. The Court was of opinion, that the sentence of the Court of Admiralty was conclusive; that this vessel had so conducted herself as to forfeit her neutrality, by acting in violation of that neutrality, and contrary to the law of nations and faith of treaties. That as to the question concerning the right of searching neutrals, [294] it was said by the Court, that before the late armed neutrality it was considered in this country, and so decided in many cases, that the right of searching neutrals was part of the law of nations, and that such right was supposed to be founded on reason. Judgment for the defendant.

3. *RICH V. PARKER*. H. T. 1708. K. B. 7 T. R. 735. S. P. *BARREY V. CHRISTIE*. T. T. 1804. K. B. 5 East, 398; S. C. 1 Smith, 462; S. C. 3 B. & P. 208.

It appeared the ship Atlantic was an American ship, and the property of ^{A warranty} the plaintiff, a native citizen of the United States of America, and that the ^{that a ship} goods were American property. The verdict set forth the treaty between ^{is Ameri} France and the United States of America in 1778, in which it was agreed that ^{can, means} (inter alia) that the ships and vessels belonging to the subjects of the other ^{she is} al- ^{so naviga} ly must be furnished with sea-letters or passports, expressing the name, ^{ted as to on} property, and bulk of the ship, as also the name and place of habitation of the ^{title her to} master or commander of the ship; that it might thereby appear that the ship ^{all the privi} really and truly belonged to the subjects of one of the parties, which passport ^{leges of} should be made out and granted according to the form annexed. And it was further agreed, that if the ships of the subjects of either of the parties should be met with, either sailing along the coast or on the high seas, by any ships of war of the other, or by any privateers, the ship of war or privateers, for the avoiding of any disorder, should remain out of cannon shot, and might send their boats on board the merchant ship which they should so meet with, and might enter her to the number of two or three men only, to whom the master or commander of such ship or vessel should exhibit his passport, concerning the property of the ship, made out according to the form inserted in that treaty; and that the ship, when she should have shown such passport, should be free and at liberty to pursue her voyage, so as it should not be lawful to molest or search her in any manner, or to give her chase, or to force her to quit her intended course. The verdict then stated, that before and at the time of sailing of the ship, &c., this country was engaged in war with France; and that the ship when she so sailed from London on her voyage for Guernsey, had not on board any sea-letter or passport made out and granted for her according to the forms annexed to the treaty; but at the time of her sailing from Guernsey, and from thence continually afterwards, until and at the time of the capture, she was furnished with and had on board her such a sea-letter or passport, &c. and which was exhibited and shown at the time of her capture and loss by the master of the ship to the commander of the French privateer.

Per Cur. The warranty that the ship was American does not mean merely that the ship was American built, but that she was entitled to all the privileges and indemnities of an American ship, otherwise it makes a difference in the value; and in order to be entitled to these privileges she should have had a passport. The assured ought to disclose to the underwriters all the circum- [295] stances, within his knowledge that may affect the quantum of the risk. Now if the underwriter had been informed that this ship would not have any passport on board in the first part of the voyage from London to Guernsey, perhaps the

underwriter would not have insured for the same premium; for this reason we think that the plaintiff is entitled to recover in this action.

4. *FERNANDES v. DA COSTA*. H. T. 1768. K. B. 1 Park, Ins. 245.

A policy upon a ship warranted Portuguese, when the premium on an English ship would have been much higher, held vitiated when there was evidence of her having been condemned in France, as not a Portuguese.

This was an action on a policy of insurance on goods laden on board such a ship, warranted a Portuguese. The insurance was made during the French war, when the premium would have been much higher on an English ship. The plaintiff gave partial evidence of her being a Portuguese, and that she was obliged on account of perils of the sea, to put into a French port, by which the cargo was spoiled. This was admitted by the defendant, who contended that during her stay at the French port she was libelled, and condemned as not being Portuguese; and that although the goods were lost by a different peril, yet in fact the ship was not Portuguese (being insured as such), and that this vitiated the policy *ab initio*; and this was agreed to be law. In order to prove that she was not Portuguese, the defendant produced the sentence of condemnation, and the confirmation thereof in the courts of France, and an answer of the present plaintiff in the Court of Chancery here by which it was admitted that the ship was condemned as not being, or under pretence of not being, Portuguese.

Lord Mansfield. As the sentence is always general, without expressing the reason of the condemnation, attested copies of the libel ought in strictness to have been produced, to show upon what ground the ship was libelled against. But as the plaintiff has, by his answer in Chancery, admitted that she was condemned as not being Portuguese, when added to the expression used in the sentence of confirmation, that the ship was condemned in the Court of Prizes, there is sufficient evidence for us to proceed upon.—The defendant, the underwriter had a verdict.

5. *WOOLMER v. MULLMAN*. T. T. 1763. K. B. 3 Burr. 1420; S. C. 1 Blac. Rep. 427. S. P. *TUBBS v. BOUDELOCK*. M. T. 1813. N. P. 4 Esp. 108.

If property warranted neutral be not in fact neutral, the insured can not recover, although the loss may happen from another cause.

Action on the case brought for the recovery of a total loss on a policy of insurance, made on goods and merchandizes on board the ship *Bona Fortuna*, at and from North Bergen to any port or places whatsoever, until her safe arrival in London. It was underwritten thus: "Warranted neutral ship and property." The defendant pleaded the general issue, and paid into court the premium received by him for the said insurance. This cause came on to be tried at Guildhall, before Lord Mansfield, when it was admitted that the plaintiff had interest on board the ship to a large value, to wit, to the amount of the sum insured. The ship, with the goods and merchandizes so laden, and being on board her after her departure from North Bergen, and before her arrival in London, proceeded on her voyage, and was by force of winds and stormy weather, wrecked, cast away, and sunk in the seas; and the said goods and merchandizes were thereby wholly lost. It was expressly stated, "that the ship or vessel, called the *Bona Fortuna*, and the property on board, at and before the time she was lost, were not neutral property, as warranted by the said policy."

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Lord Mansfield and the rest of the Court were of opinion that it was too clear a case to bear an argument. This was no contract; for there was a falsehood in respect of the condition of the thing insured, because the plaintiff insured neutral property, and this was not neutral property.

6. *POLLARD v. BELL*. H. T. 1800. K. B. 8 T. R. 434.

The extent to which a ship is required to be documented must be considered with reference to the law of nations, and so those

This was an insurance on goods on board the ship *Juliana*, warranted a Dane, on a voyage from London to Teneriffe, with liberty to touch at Guernsey and Madeira, for account of persons resident at Teneriffe; and the loss was declared to be by capture. At the trial a verdict was found for the plaintiff, subject to the opinion of the Court upon a case which stated that the ship was a Danish ship and the property of Danish subjects, and previous to the voyage insured, had a passport signed by the King of Denmark for a voyage from Copenhagen to the ports in the East Indies. Eggleston, the captain of the ship, sailed from Copenhagen on the 23rd of June, 1796, having on board a cargo of tar, pitch, &c., and arrived in the Thames, according to verbal orders

from his owners, 23d of July, 1796. During his stay he took on board goods for the owners, besides those in question; and having taken out clearances for Madeira and Guernsey, sailed, arrived at the latter place, and after sailing from thence was captured by a French privateer and carried into Bourdeaux. At the time of the capture, and during the whole voyage, the Juliana had on board the passport and every other document usually carried by Danish ships. She had also a *role d'equipage*, containing the names and places of nativity of the officers, but not of the crew, only stating the latter generally to be fixed men of colour. Captain Eggleston was born in Scotland, of English parents. He was not naturalized in Denmark; but on the 6th of October, 1794, posterior to the war between England and France, he obtained letters of burghership in Denmark, but had no domicile, never having resided there. Proceedings were instituted at Bourdeaux, before the tribunal of commerce, which condemned the ship and cargo, except one bale belonging to the captain, as prize; from this sentence Captain Eggleston appealed to the civil tribunal of La Gironde, where there was a general sentence of condemnation. These sentences referred to several French ordinances, particularly that of Mayne v. Walter, of 1778, by which it is declared that all ships shall be confiscated whenever there shall be found on board, a supercargo, merchant, commissary, or chief officer, being an enemy's. It is not necessary to state these sentences, because the Court of King's Bench were of opinion that the effect of these sentences, and particularly of the ultimate sentence now to be mentioned, was to condemn, not on the ground that the property was not neutral, but because the circumstances of the captain's being a Scotchman was a violation of this ordinance. From the two former sentences, the captain appealed to the Supreme Tribunal of Cassation at Paris, which decreed, as follows: "Having heard the parties, the tribunal, considering that it has been fully proved by the confession of Captain Eggleston, and ascertained by the judges of La Gironde, that said Captain Eggleston was born in Scotland, and an enemy; that his denization in a neutral country was not justified according to law; that his quality of enemy sufficed to legitimate the prize; that the fact of Captain Eggleston being a Scot and an enemy, existed independently of the papers on board; that in consequence all remedies of nullity, either from the withdrawing of some of the papers on board, or from the non-application of the seal to the bag wherein they were enclosed, cannot give any ground to cassation; regrets the request of Captain Eggleston, and condemns him to the fine of 150 francs." After this case was twice argued,

Per Cur. This is an action brought on a policy of insurance to recover the amount of a loss stated in the declaration. The plaintiff proved his interest, and the loss, and *prima facie* proved that the ship was Danish. The defence of the action is, first, that though it is stated the ship was Danish, she was in truth the property of an enemy, and, therefore, not neutral; and secondly; that she had not documents on board to prove that she was neutral. With regard to the first, it is not only not stated as a fact, nor to be collected by reference, that she was not a neutral ship, but it is expressly stated as a fact in the former part of the case that the ship was a Danish ship and the property of Danish subjects. If this had been found as a fact on a special verdict it would have been conclusive, and we could not have inferred the contrary from the sentence; but referring to the sentence, it comes to this, that it here appears that the ship was a Danish ship, unless the circumstances of the captain's having been born in Scotland is evidence to show that it was not a Danish ship; but we find nothing to warrant that, either in our own law or in the law of nations. In the case of Mayne v. Walter, the Court of Admiralty in France condemned the ship, because she had an English supercargo on board, which was contrary to one of the French ordinances; but this Court did not consider that the circumstance of a neutral ship having on board an English supercargo was a breach of neutrality. So here this ship having on board a native of Scotland, is no proof that the ship in question was not neutral. As to the second question, if the ship had been condemned for not

having the proper documents on board, we must have decided for the defendants. But it appears by the case that in point of fact she had "every document usually carried by Danish ships." Judgment; that if the ship had been condemned generally as a lawful prize, our law would have considered that as a denial of her neutrality; or if the ground of the sentence of condemnation had been that the ship was not neutral, that also would have been conclusive in this action. But by referring to the last sentence, which we consider as the sentence of dernier resort, it evidently appears that she was condemned because the captain was born in Scotland and an enemy. Our opinion then on the whole is, that as the ground of the sentence of condemnation was an infringement of an ordinance of one state, it does not appear by that sentence that the ship was not what the jury found her to be, a Danish ship, or that she was condemned for having, by an act contrary to the law of nations, forfeited her neutrality.

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But a ship warranted of a particular nation may, in some cases, falsify that warranty by a non-compliance with the municipal laws and ordinances of her own country.

7. *BARENY V. CLAGGETT*. T. T. 1802. C. P. 3 B. & P. 205.

Policy of insurance on a ship warranted American. To negative this warranty, a sentence of condemnation of a French court at St. Domingo was given in evidence, which began thus: "Condemnation of the English ship Mount Vernon. Extract from the books of the office of the provisional tribunal respecting prizes, established at St. Domingo; W. F. P. Judge," &c.; and after stating that the circumstances of papers having been thrown overboard, the captain and supercargo having abandoned the ship, the captain being a Portuguese, without a certificate of his naturalization, and the United States, in their last treaty with England, having suffered to be added to the articles which had before been considered as contraband of war, stores, &c., were sufficient motives to condemn the said ship, condemned the same as property belonging to the captor. The Court being of opinion that the sentence of condemnation proceeded either on the ground of the ship being neutral property, or on the ground that she was not properly documented, so as to entitle herself to the privileges of a neutral, adjudged the sentence to be conclusive evidence against a warranty of neutrality.

8. *HAVELOCK V. ROCKWOOD*. T. T. 1799. K. B. 8 T. R. 268. S. P. *ODDY V. BOVILL*. T. T. 1802. K. B. 2 East. 413. *HUGHES V. CORNELIUS*. H. T. 1660. C. P. T. Ray. 473; S. C. Skin. 59. Carth. 32. 2 Show. 232. *LE CAUSE V. EDEN*. E. T. 1780. K. B. Doug. 572. *FAITH V. PEARSON*. H. T. 1816. C. P. 6 Taunt. 439; S. C. 2 Marsh. 133. *GEYER V. AGUILAR*. T. T. 1798. K. B. 7 T. R. 681.

The sentence of a foreign court of admiralty, held in the territories of a belligerent, or his ally in the war, condemning property as prize, affords conclusive evidence against a warranty [299] of neutrality.*

This was an action upon a policy of insurance. The ship *Sensis* was insured for twelve months, and during that period was captured and carried into Bergen, in Norway, and there condemned by the French consul. After this sentence the ship was put up to public auction at Bergen, by the public officer of the court of Denmark, having been previously advertised, and was repurchased by the agent of the plaintiff; and for this repurchase money the plaintiff insisted (if not entitled to recover as for a total loss) he was at all events entitled to a verdict. The Court, after hearing two arguments, were unanimously of opinion, that as the sentence of the French consul in a neutral country was contrary to the law of nations, and void, the property never was divested out of the original owner; and that therefore the money paid for the repurchase was in the nature of a ransom. The ransom acts are remedial laws, and in the construction of such acts it is the rule to extend the remedy so as to meet the mischief; and the legislature intended to prevent such a transaction as the present taking place, because it would take away the chance of recapture. The circumstances of this being done by an agent at an auction, and on land, were deemed immaterial, the acts of parliament not having described at what places or in what form it prohibited; but having prohibited ransom in general terms, the case was thought to come within the mischiefs

* The sentence to be available must be produced in evidence under the seal of the court: 2 N. R. 228; 4 Camp. 80; 3 id. 215. On the subject of these sentences, see 3 B. & P. 449; Doug. 554; 7 T. R. 697; 6 id. 196. 438; 2 East. 478; 6 id. 155.

against which those statutes were made to guard. But though the law upon the subject of capture in insurances is so clearly defined, that at this day it seems almost impossible to raise a question, yet it formerly occasioned much doubt and litigation what effect a recapture might have upon this kind of contract, and how long it was necessary for goods to remain in the hands of the enemy, in order to divest the original proprietor of his property in case of a recapture.

9. *LOTHEON v. HENDERSON*. T. T. 1803. Dom. Prac. 3 B. & P. 499.

Per Lawrence, J. A warrant of neutrality must, I conceive, now be understood as containing in itself (among other things) a stipulation that the contract of assurance shall be void, if the subject matter warranted neutral be condemned as enemy's property; and, if a warranty of neutrality contains this stipulation, the sentence of a court of competent jurisdiction condemning a ship on account of its want of neutrality is the proper evidence, according to every principle and rule of our law, to determine that fact. Hence, when such a Court has condemned a ship and goods as "enemy's property;"

10. *EVERITH v. HANNAM*. M. T. 1815. C. P. 6 Taunt. 375.

The facts are detailed, *post*, 302.

Per Cur. The question is, whether the assured, shut out from his right to recover in the first instance by proof of the violation of the blockade, has replaced himself in a situation to recover by proof that it was the master, and not the plaintiff, who had been violating the blockade. The plaintiff started this case by the master's swearing he was off Norway, sailing for Leith, and was there seized. This evidence, if it stood alone, would entitle the plaintiff to recover. The defendant put in a sentence of condemnation for breaking the blockade. The plaintiff contended that so much of the captain's evidence might be received and must be believed as was not inconsistent with the sentence; that when the master swears he was making Leith direct, we must disbelieve him, and believe that he did break the blockade of Norway, but that we must believe that he did it without the directions of the owner, and that therefore he is guilty of barratry. On consideration, we think that this is not sufficient evidence so to fix the master with barratry as to entitle the plaintiffs to recover, without much more inquiry. The master cannot be fixed with barratry, unless he acts criminally; we cannot raise that charge on the loose expression that he was bound for Leith; he might be so, and yet might have orders to touch in Norway. Observe, it is on this ground that we think there ought to be a further inquiry. We do not decide on the point of pleading, nor whether a sentence of condemnation is conclusive evidence up to the extent of fixing barratry on the master; we only say, that in this case there is not sufficient evidence to prove barratry. We therefore think that the rule must be absolute for nonsuit. Or break ing a block ade; a sentence so pronounced is conclusive against a warranty of neutrality;

11. *POLLARD v. BELL*. H. T. 1800. K. B. 8 T. R. 438.

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Grose, J. I admit, that if the ship had been condemned generally as a lawful prize our law would have considered that as a denial of her neutrality, or if the ground of the sentence of condemnation had been that the ship was not neutral, that also would have been conclusive in this action. Or as law ful prize;

12. *CHRISTIE v. SECRETAN*. E. T. 1799. K. B. 8 T. R. 196.

Kenyon, C. J. The French Court of Admiralty did not condemn the ship and cargo for a non-compliance with the treaties that subsisted between France and America: if they had condemned the ship and cargo for having violated such treaty, we should not have been able to extricate ourselves from the effect of such a sentence. Or as hav ing violated the law of nations, or the faith of treaties.

13. *BARING v. ROYAL EXCHANGE ASSURANCE COMPANY*. E. T. 1804. K. B. 5 East, 99. S. P. *LOTHEON v. HENDERSON*. T. T. 1803. K. B. 3 B. & P. 499. *BARING v. CLAGETT*. T. T. 1802. C. P. 3 B. & P. 201. *BOLTON v. GLADSTONE*. E. T. 1804. K. B. 5 East, 155; S. C. 2 Taunt. 85. 1 Smith, 392; 3 Taunt. 511.

A foreign court of prize professes to condemn a ship and cargo on the ground of an infraction of treaty, in not being properly documented, &c. as required by the treaty between the captors or captured. On the question, whether The adjudication is conclusive.

even where such sentence is conclusive in our courts against a warranty of neutrality of such ship and cargo, in an action upon a policy of insurance against the underwriters, the Court said: "Does not this sentence of condemnation proceed specifically on the ground of infraction of treaty between America and France, in the ship not having those documents with which, in the judgment of the French court, the American was bound by treaty to be provided? We do not say that they have construed the treaty rightly. On the contrary, suppose them to have construed it ever so iniquitously, yet, having competent jurisdiction to construe the treaty, and having professed to do so, we are bound by that comity of nations which has always prevailed amongst civilized states, to give credit to their adjudication when the same question arises here upon which a foreign court has decided. After arguing for hours we must come to the same conclusion at last, that the French court has specifically condemned the vessel for infraction of treaty, which negatives the warranty of neutrality. Their having distinctly adjudged the vessel to be good prize, upon a ground within their jurisdiction, unless we deny their jurisdiction, we are bound to abide by that judgment. Wherever a case occurs of a condemnation by a foreign court on the ground of *ex-parte* ordinances only, without inferences from them to show an infraction of treaty between the nation of the captors and the captured, and referring the judgment of the Court to the breach of treaty, we shall be glad to hear the case argued, whether such ordinances are to be considered as furnishing rules of presumption only against the neutrality, or as positive laws in themselves, binding other nations *proprio regimine*?"

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Nor can a fact stated in the condemnation be contradicted by the insured;

14. HORNEYER v. LOCKINGTON. H. T. 1812. K. B. 15 East, 46.

The goods insured were laden on board the ship in the port of London. She sailed with a licence, and took on board simulated papers, representing that she came from Berghen, in Norway. Sweden being then at war with Russia, she arrived at Gottenburgh, from whence, after receiving orders, she proceeded to and arrived at Riga, where her papers were taken, and her hatches immediately sealed down by the government officers, until her papers could be sent to St. Petersburg to be examined; and on such examination orders were immediately sent to Riga to seize the ship and cargo, which was done, and she was afterwards condemned with her cargo, on the ground of having simulated papers on board. This, Lord Ellenborough held, was not a mooring twenty-four hours in safety, there having been an incipient seizure immediately on her arrival, which ended in her condemnation.

Lord Ellenborough, C. J. then said, on motion for a new trial, "I do not pronounce whether the carrying of simulated papers was or was not an enhancement of the risk insured; but my opinion is founded on the effect of the sentence of condemnation, which has proceeded upon the mere personal act of the assured in carrying such papers, which it treats as a crime, and which act is thereby proved to have been the efficient cause of the loss, the very ground of the condemnation. How then can the underwriter be answerable for a loss which happened from an act of the assured done without his leave?" The other judges concurred with his lordship in this opinion.

15. GEYER v. AGUILAR. T. T. 1798. K. B. 7 T. R. 681. BARRY v. ROYAL EXCHANGE. E. T. 1804. K. B. 5 East, 99.

So, it is conclusive, even if the legality of the sentence depends upon the construction of a treaty.

By the sentence of a French court of admiralty, it appeared that the ship insured, warranted American, had been condemned as enemy's property for want of having on board a *role d'équipage*, or list of the crew, such as is required by a marine ordinance of France, and adjudged by the court there to be requisite within the meaning of the treaty of commerce between France and America.

Per Cur. We come to decide this case bound and shackled by certain rules, from which we dare not depart. The acts of pirates are to be treated as the acts of pirates; they do not profess to have any civil code of laws by which they are to be restrained. But civilized nations profess to be governed by certain rules, and the comity due from the courts in one country to those in another induces them to give credit to each other's acts; and so we must con-

time to act in this country, until the legislature shall think fit to forbid it. There is the same comity between the different courts in this kingdom. Where there has been a proceeding in the Exchequer, and a judgment on record, as long as the judgment remains in force, it is obligatory on the parties who have civil rights depending on the same question. Not long after Lord Mansfield [302] came into this court, in an action brought against an officer of the Customs of Excise, he was told by Mr. J. Denison, that as the question had been already decided in the Exchequer by a condemnation of the goods seized, the judgment of that court was conclusive in favour of the defendant. Here, at first, Lord Mansfield doubted the propriety of that opinion; but on inquiry, finding that Mr. J. Denison was right, he acquiesced, and always afterwards acted upon it. We admit the cases of *Mayne v. Walter*, and *Saloucci v. Johnson*, up to their extent; we admit that, if a foreign court of admiralty proceed on grounds contrary to the law of nations, their judgment ought not to have weight in the courts of this country. But let us see what this case is. The ground on which the courts in France proceeded was, that this was a capture of enemy's property; and it certainly is not contrary to the law of nations to condemn a ship on that ground. Whether or not these courts arrived at that conclusion by proper means, we are not at liberty to inquire. Here, the question is, whether they have not stated as the ground of condemnation a ground which will bear them out, supposing it to be true; and we are clearly satisfied that they have. They concluded from the evidence that this was enemy's property; not indeed in the formal language of our courts of justice, but they say in substance, we think this is enemy's property, and therefore we condemn the ship and cargo. Now that determines this case; for as long as the foreign judgment is binding upon us, the conclusion that we must draw from the judgments in this case in France, is that the property which was warranted to be American, is found by that judgment not to be American property. We felt, this, however, as the grossest injustice towards the Americans. The French courts seem, in this instance, to have proceeded on Algerine, nay, on worse principles, because they professed to proceed according to law, but in reality made the law a stalking-horse for an act of piracy. But we cannot now question the legality of their decision; we are bound to decide according to the law; it is our duty. *Jus dicere et non dare.*

16. *EVERITH v. HANNAM.* M. T. 1815. C. P. 2 Marsh, 72; S. C. 5 Taunt. 375.

Action on a policy of insurance. The captain of the *Wilhelmina*, on the part of the plaintiffs, stated that the ship sailed from Aarhus, in Jutland, with a cargo of corn, bound for Leith, on the 26th of May, 1814; that he was pursuing his direct course for Leith, as far as the wind and currents would permit, without any other object or intention; that the currents carried him nearer than he intended to Norway, which was then under blockade by the Swedish government, and that on the 30th of May, the ship being then about five German miles from Ahrendahl, on the coast of Norway, was taken by the Swedish frigate *Eurydice*, and carried into Gottenburgh. On the part of the defendant the sentence of condemnation by the Swedish Court of Admiralty was produced, which stated that from the situation in which the *Wilhelmina* was found, it clearly appeared that the captain had endeavoured to enter a port of Norway, and on that ground the condemnation proceeded. It was then contended, for the plaintiffs, that the sentence, if it proved the breach of the blockade, also proved barratry on the part of the captain. It appeared that the ship was bound by the owners for Leith, and that the defendant could not set up as a defence to a loss by seizure, that that seizure was authorized by the barratrous act of the captain, when the same evidence would entitle the plaintiffs to recover as for a barratry. A verdict was found for the plaintiffs; the Chief Justice reserving three points for the consideration of the court: 1st. Whether the sentence was conclusive evidence of the breach of blockade so as to preclude the plaintiffs from recovering? 2nd. Whether the sentence, coupled with the testimony of the captain, that the ship was bound for Leith, were also [303]

conclusive evidence of barratry? And 3rd. Whether, if it were, the plaintiffs would be entitled to recover on that ground without a count for barratry?

Per Cur. The plaintiffs commenced their case by calling the captain, who stated that he was bound for Leith, that he pursued that course as far as he was able, and that he was taken about five German miles from the coast of Norway by a Swedish frigate; so far the plaintiff would have been entitled to recover. But then the defendant gave in evidence the sentence of condemnation, by which it appeared that the ship had broken the blockade, and had been condemned on that ground. This being proved, the plaintiffs contended that though the blockade had been violated, yet taking it with the captain's evidence, that the owners had given him instructions to proceed to Leith, that violation must be considered as an act of barratry on his part. Thus much of his evidence they are desirous of receiving, but they wish to reject the rest, as being contradicted by the sentence of condemnation. The Court are accordingly desirous to conclude from the captain's evidence, that his directions were to go to Leith, and from the sentence that he had committed a breach of the blockade, which it was contended was an act of barratry on his part.—Even supposing the law to be as the plaintiffs contend, we are of opinion that the evidence did not warrant it, and that it required much more inquiry, even on that principle, to fix the captain with barratry; that cannot be done, unless he act criminally; and to say that he broke the blockade in disobedience to the instructions of the owners for some private interest of his own, is too strong an inference from the evidence as it stands. The ship might have been bound for Leith, and yet might have received directions to touch at Norway, and for other reasons she might have gone thither, without any imputation of barratry. On this ground, therefore, we are of opinion, that the plaintiffs cannot resort to their claim for barratry. We do not decide whether they could or could not have done so on the present declaration, supposing the facts had borne them out; nor whether in an action against the underwriters for the barratry of the master, the sentence of condemnation be so conclusive as to preclude any other evidence from being received to rebut it; we only decide that the facts of this case do not afford sufficient evidence of barratry.—Rule absolute. See *Campb.* 143; 8 *East*, 126.

- [304] 17. *CALVERT v. BOVILL.* T. T. 1798. K. B. 7 T. R. 523. *POLLARD v. BELL.* T. T. 1800. K. B. 8 id. 434. S. P. *BIRD v. APPLETON.* E. T. 1800. K. B. 8 id. 562. *PRICE v. BELL.* T. T. 1801. K. B. 1 *Erst*, 663. *BERNARDI v. MOTTEAUX.* H. T. 1781. K. B. *Doug.* 575. *FISHER v. OYLE.* T. T. 1808. K. B. *Campb.* 418.

But it has not that effect if it condemns the ship or goods on account of the violation of some private ordinance;

In an action on a policy of insurance on the captain's goods and private adventure, warranted American property, on board the ship *Friends*, at and from London to Virginia, a sentence of a French Court of Admiralty was produced which was to the following effect: "Forasmuch as the true destination of the ship was for the English islands, having been hired and loaded at London, and that there has been found on board her eighty barrels of gunpowder, the Court declares the said brig *Friends*, together with her cargo a good prize." The Court of King's Bench held that this sentence was not conclusive against the warranty of neutrality, the facts of the case and the reasons expressly given leading to a contrary conclusion. If the sentence, indeed, had condemned the goods because they were the property of an enemy, that judgment would have been conclusive, but they have given other reasons for their sentence.—See 3 B. & P. 216; 5 *East*, 155; 2 *Traut.* 85.

18. *ODDY v. BOVILL.* T. T. 1802. K. B. 2 *East*, 473.

Nor is a sentence of condemnation available, if it appear that the court was not con-

Per Lawrence, J. The question is, whether this sentence of condemnation be conclusive evidence that the property insured was British, and consequently that the warranty of its being neutral was not complied with? The argument was attempted to be carried into a wider field, than we think fit now to enter into, since the case of *Hughes v. Cornelius* (T. Ray. 473; *Skin.* 59; and 2 *Show*, 232.), and a long string of authorities which have followed that decision. We must now, therefore, take it for granted, that if this sentence were

given by a court of competent jurisdiction, it is conclusive upon the point then ^{stituted according to the law of nations:} in judgment, namely against the neutrality of the property. The case of the *Flad Oyen* has been made the basis of the argument, to show that unless the prize court were constituted according to the law and practice of nations, it could have no jurisdiction. If there were no other case on the subject, determined by the same learned judge, to explain how far he meant to go in that case, it might be doubtful, from some expressions then used, whether it did not extend to a case circumstanced like the present; but if we look at his other decisions on this subject, particularly in that of the *Christopher*, though I do not mean to say that it is directly in point, it sufficiently appears from the reasons assigned by him in giving judgment, to what extent the doctrine laid down by him in the *Flad Oyen* case should be understood; and that he did not intend to deny the legality of such sentences of condemnation by the captors in the country of a co-belligerent or ally in the war; because, as he observes, there is a common interest between such on the subject, and both governments may be presumed to authorize any measures conducing to give effect to their arms, and to consider each other's part as mutually subservient. This very question appears to have arisen in several subsequent cases, and in the case of the *Betsy Kruger*, in August, 1800, seems to have been considered by the advocates as so thoroughly understood and settled, that the question of law was waived as one not to be discussed; and the Court, proceeding on the ground that the condemnation was legal, directed further proof to be made of the fact of the transfer. We find then this question already determined, by a court having peculiar jurisdiction in cases of this sort, of which we have only incidental jurisdiction. That determination, therefore, is as conclusive on us as to the proper rule of decision as a judgment of the common law courts on a question of real property would be in the civil law courts.

19. *SIFFKEN v. LEE*. T. T. 1807. C. P. 2 N. R. 489.

Per Heath, J. The conclusive effect of the sentence of condemnation is now settled; whether is not the same effect to be given to the sentence of acquittal? Prize or no prize ought to be decided by the law of nations, and that law must be collected from the writers upon the subjects, and from the treaties existing between nations. In *Barzilloy v. Lewis*, noncompliance with the provisions of the treaty of Utrecht, by a ship warranted Dutch, was held to be fatal, because the provisions of that treaty were part of the law of nations. ^{A sentence of restitution is as conclusive as a sentence of condemnation.}

20. *BERNARDI v. MOTTEAUX*. H. T. 1781. K. B. Doug. 575.

The defendant underwrote the policy; that the ship was taken by a French frigate called *La Magicienne*, as she was sailing from Venice on her voyage to London; that the plaintiff offered to give evidence on the trial that the property of the ship and the property of the cargo were neutral, and that the papers belonging to the ship fell overboard by accident after she was brought to by the French frigate; but the defendant objected to such evidence being received, and produced, as the ground of his objection, the sentence of the condemnation of the ship in the French Admiralty Court, which was read and is as follows: "*(Almaria. The Joanna.)* Louis Jean Marie de Bourbon, Duk de Penthièvre, Admiral of France, seen by us, the Procès Verbal made on board the snow *Joanna*, taken by the King's frigate, *La Magicienne*, commanded by M. de Boades, dated the 2nd of December last, signed Saint Owey, steward, Bourret, Dominico Zane, seen by the captain commander, signed, Boades, purporting, that the said 2nd of December last, at five o'clock in the evening, his said Majesty's frigate, *La Magicienne*, commanded by the said Captain de Boades, being ten leagues east of Cap des Moulins, having discovered a snow steering south-south-west, the wind south-west, and having come up with her, and stopped her, under Venetian colours, after an hour's chase, the said M. de Boades ordered the captain to bring on board his muster-roll, passport, and bills of lading, with which order the captain did not readily comply, under a pretence that the sea was rough, and that his long-boat was leaky; but being at last obliged to comply, upon threats being made of firing on him, and being come on board, he declared that in getting up the ship's side the box containing his ^{Where the nature and constitution of the foreign court do not appear upon the face of the sentence, no course must be had to the proceedings to ascertain the ground and foundation of the sentence.}

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muster-roll, his patents, and passport had fallen from his pocket into the sea, and only showed his bills of lading, by which they found the said snow, the Joanna, of fourteen men, including officers, commanded by Dominico Zane, of Venice, sailed from Venice the 25th of September with a cargo of twelve bales of silk, dried raisins, oil, cream of tartar, potash, and other effects mentioned in the bills of lading by him exhibited, for the account of sundry persons in Venice, consigned to sundry merchants in London, whither he was bound. These goods going into an enemy's country, and the loss of his papers, which had fallen into the sea, raising suspicions, the said snow had been stopped, and carried by his said Majesty's frigate *La Magicienne* to America, where she had been put into the hands of the counsel, after the said Saint Owey, lieutenant, acting as steward, and the said Bouret, ensign on board the said frigate, had put their seal on the said snow, where they found no papers, and taken on board the said ship ten of the said snow's crew, who were replaced by six men from on board *La Magicienne*, and three from the *Atalante*, with a coasting pilot, who have brought the said snow into the port of Almerico. The premises considered, we, by virtue of the power delegated to us as aforesaid, have declared, and declare as good prize, the ship the Joanna, her tackle and apparel, together with the goods of her cargo, and do adjudge them to the captors; that in consequence of this decree the whole be sold (if not already done) in the usual manner, and the produce divided according to the desire and ordinance of the King, made the 28th of March, 1778. We order, by these presents, the Vice-consul of France at Almerico, to look to the execution of this our ordinance, and thereby authorize and command the first tipstaff or serjeant to proceed in all forms or requests thereto. Done at Paris, the 13th of January, 1779. Bigot." The question stated for the opinion of the Court was, whether the said sentence was not conclusive evidence against the plaintiff's recovering in this action? If the Court should not think it conclusive, then a verdict to be entered for him; if they should think it conclusive, then a nonsuit to be entered.

[307] Lord Mansfield said: The first principles are clear and admitted. All the world are parties to a sentence of a court of admiralty. Here there is a monition published at the Exchange, and in other countries at some place of general resort, and any person interested may come in (3 B. & P. 345.) and appeal at any time if there has been no laches; if there has, the time of appeal is limited; but the sentence, as to that which is within it is conclusive against all persons, unless reserved by the regular court of appeal. It cannot be controverted, collaterally, in a civil suit. The difficulty here is, what the ground was on which the French Court of Admiralty went, whether the ground of enemy's property, or that of papers being thrown overboard. By the maritime law of all countries, throwing papers overboard is considered a strong presumption of enemy's property, and upon that principle the arrest of 1778 is founded. But in all my experience in England I have never known a condemnation on that circumstance only. It is made use of as a strong ground of suspicion. The Court is very rigid. It is difficult to find out what the ground of this sentence was; I incline to think the Court went upon the ground of enemy's property, and considered the want of papers as a strong presumption of that fact; but they did not examine the captain upon interrogatories as to the contents of the papers; and, upon the whole, enough does not appear on this obscure sentence to ascertain precisely upon what it was founded, and some other method ought to be taken to inquire what the ground of it was. As to whatever it meant to decide, we must take it as conclusive.

Wilkes, and Ashurst, Justices, concurred with his lordship.

Buller, J., said, that to be sure the sentence was obscure; but taking it altogether, he did not think there was much difficulty in discovering the grounds of it. The two circumstances of the cargo being consigned to the enemy, and the falling of the papers into the sea, are stated as the grounds of suspicion. The latter circumstance, papers falling into the sea, could raise no other suspicion, nor a presumption of any thing else but the property being ene-

my's property; it follows, therefore, that the condemnation went upon that ground. If it had gone upon a wilful throwing papers overboard, that would have been stated substantively as the ground. In the first place, lay the arret out of the case, and then wilful throwing papers overboard is only presumptive evidence of enemy's property; then take the arret, still wilful throwing overboard might have been used as evidence of enemy's property, or it might have been a substantive ground under the arret: here it is not stated as a substantive ground.

21. *ARCANGELO v. THOMPSON*. H. T. 1811. N. P. 2 Campb. 620.

Action on a policy of insurance. The ship was captured by a French privateer, carried into Venice, and there condemned, together with her cargo. This appeared to have happened through an agreement between the captain of the ship and the captain of the privateer. To prove the ship to be a Dane, the evidence was, that the captain, when at Trieste, addressed himself to the Danish consul there; that when he left that port he carried Danish colours; and that when he was brought into Venice he had still the same colours with the French flag flying over them. It was contended, that the acts of the captain were no evidence to show to what country the ship belonged. He might have various reasons for passing as a Dane, although he belonged to one of the belligerent powers; therefore, some documents should be produced, or some witness called, to prove that the warranty had been complied with.

Lord Ellenborough. I think the acts of the captain are *prima facie* evidence for the owner of the goods, to show to what nation the ship belonged. The circumstance of the ship carrying Danish colours when she was captured would have very little weight, as in the moment of danger any strange flag might be hoisted for the purpose of deception; but from the captain having carried Danish colours when he sailed securely from the port of Trieste, and having there addressed himself to the Danish consul, and conducted himself as the master of a Danish ship would have done, I conceive there is fair ground for the jury to infer that the ship really was Danish, according to the warranty.

22. *TYSON v. GURNEY*. M. T. 1789. K. B. 3 T. R. 478.

Per Cur. The fact of there being an appellate jurisdiction, but no appeal made, do not diminish the conclusiveness of the sentence.

23. *SIFFEN v. LEE*. T. T. 1807. C. P. 2 N. R. 484. *MULLETT v. SHEDDEN*. H. T. 1811. K. B. 13 East, 304.

A vessel, warranted Dantzic, was captured by a French privateer, and condemned as prize by a French court of admiralty. This sentence of condemnation was afterwards reversed by a court of appeal. The ship was proved to be a Dantzic ship, and to have had on board at the time of the capture all the papers ever carried by Dantzic ships. The French regulations were not shown to have been with the knowledge of the people of Dantzic. In an action on the policy it was contended that the underwriters were not liable, because the sentence of restitution had refused damages and costs to the assured; but the Court were of a contrary opinion, Sir J. Mansfield observing, that no question had ever arisen as yet with respect to the refusal of a prize court to allow damages and costs as discharging the underwriters from their liability, and, indeed, it would be very strange if such a refusal did discharge them. It was a matter of mere discretion in the Court. In this case the refusal to allow them was founded on two private ordinances of France, not shown to be within the knowledge of the people of Dantzic; and, therefore, the refusal of the French court could afford no ground for holding the underwriters released from their engagement to pay. The Chief Justice added, that he saw no reason for extending the doctrine of the conclusiveness of sentences of courts of admiralty.

24. *LOTHEON v. HENDERSON*. T. T. 1803. C. P. 3 B. & P. 499.

Per Lawrence, J. With respect to the explanatory agreement, or, rather, explanatory declaration, I think that it has not at all varied or narrowed the set of proof, which it is in general competent to the assured to adduce in support of a sentence of

condemnation may be obviated by agreement between the parties.

port of his claim, or to the underwriters to use in resisting it. It is extremely probable that neither of the parties understood the subject sufficiently to advert to, and provide for, the questions which ordinarily arise from the variety of events to which such a voyage is subject, and it is possible that their design may have been to settle their rights without regard to the sentence of any Court, in case of capture. But this does not in my opinion go further than conjecture. And I think it by no means clear that the underwriters intended by this declaration any thing more than to explain to the assured (who seem to have been little acquainted with the construction put upon policies) the meaning and effect of the instrument, without any design of altering or varying the circumstances, according to which, by the forms of the policy, they were liable for the losses insured against. But if this declaration has subjected the underwriters to a loss, under circumstances different from those by which only they could be affected according to the terms of the policy, it must be either from the loss by capture, being the only one which is noticed by this declaration, or upon the mode in which the loss was to be settled, or from the reliance which the underwriters profess to place in the endeavours of the agents of the assured to recover the property as for the account of the shippers. Had there been no such agreement or declaration, and the claims of the assured had rested merely on the policy, they would have had no demand on the underwriters without being able to prove the ship an American ship, and it would have been competent to the underwriters to controvert the proofs adduced by contrary proofs, and among other proofs by the sentence of the tribunal at Nantz, supposing it to be admissible in evidence. It is there to be seen, first, whether mentioning the case of capture only, and not taking notice of any other loss, will make a difference as to the proof; and I conceive it will not.

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25. VON TANGELU V. DEBORS. E. T. 1809. K. B. 2 Campb. 151.

The sentence of a foreign court of admiralty is not conclusive in the case of a representation as it is in the case of a warranty of neutrality.

The ship was not stated to be of any particular country in the policy; but in the letter directing the insurance she was described as carrying the Kniphausen flag; and in the broker's written instructions shown to the underwriters she was called a Kniphausen vessel. The captain swore that the *Neptunus* belonged to Varrel, a port in the Kniphausen territory; that she was properly documented according to the laws and resolutions of that principality; and that she was captured on her voyage back from Oporto to London, and carried into Dunkirk. The defence was rested on the decree of the French Admiralty Court, which condemned the ship for the following among other reasons; 1st. That she had suffered herself to be searched by the English. 2nd. That she had put into an English port. 3rd. The inimical quality of the vessel, which, in November, 1805, belonged to an English subject, then an enemy, and was purchased from him by the present claimant; that sort of acquisition made after the commencement of hostilities being proscribed by the regulations of the 6th of July, 1778. 4th. The deficiency as to the certificate of origin.

(c) *Of captain's licence.*

TAIT V. LEVI. M. T. 1811. K. B. 14 East, 481.

Where the very object of the policy requires discriminating knowledge of the coast on the part of the captain, there is an implied warranty that he possesses it.

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This was an action on a policy of insurance on the ship *Catharine* and goods, at and from Cork to the ship's loading port or ports on the coast of Spain, within the Straits of Gibraltar, including Tarragona, and not higher up the Mediterranean during her stay there, and from thence to London, with liberty to discharge and take in goods at whatever place she might touch at, &c. Tarragona was then in possession of our Spanish allies; but Barcelona, another port of Spain, which is further up the Mediterranean, was in possession of the French enemy. It was the intention of the captain, to go into Tarragona; but a currant, as he supposes, carried the vessel beyond it in the night, and the captain, being entirely ignorant of the coast, mistook Barcelona for Tarragona, and was entering the former port, when he was captured by the French. The two towns were proved to be not at all alike in their appearance from the sea. Lord Ellenborough, C. J. was of opinion that the underwriters were not liable for this *crassa negligentia* or *ignorantia*, on the part of the captain, which did not amount to barratry, as not being a wilful misconduct or fraud on his part; and therefore nonsuited the plaintiffs.

Per Cur. If such misconduct amount to barratry, the underwriters expressly engage to indemnify the assured against it; but here the whole and anxious object of the underwriters, for which they expressly stipulated, was that they should not be answerable for any risks higher up the Mediterranean than Tarragona; and therefore, the voluntary exceeding of that limit, through the ignorance of the captain, we consider as a deviation from the voyage insured, which discharged the underwriters. When the object of the contracting parties was to mark the real limits of the coast on which the vessel was navigating, and when the point of danger was so nigh at hand to the place to which the ship was bound, which was the utmost limit of the underwriter's engagement, there was great negligence in sending a captain who was totally ignorant of the coast, as it was in proof that he confessed himself to be; he only supposed that it was a current, which carried his vessel beyond Tarragona in the night; but there was no proof even of that; there was then no just cause for the deviation, but it resulted solely from his ignorance. If he had been driven off Barcelona by stress of weather, it would have been a different consideration. We think the case against the assured *quacunqve via data*, either on the ground of a deviation from the limits of the voyage described in the policy, without any just cause, or on the ground of an implied warranty to provide a master of a reasonably competent skill, which was not complied with by sending out one who was totally ignorant of the one port and of the other, of Tarragona and Barcelona, when it was the immediate and prominent object of the policy to distinguish between them.

(d) *Of the number of the crew.*

BEAN V. STUPART. M. T. 1778. K. B. Doug. 11.

The plaintiff insured the ship called the Martha, at and from London to New-York, the voyage to commence from a day specified; and on the margin of the policy was written these words: 'Eight nine-pounders, with close quarters, six six-pounders on her upper decks, thirty seamen besides passengers.' The ship sailed from the Downs on the 1st of March, and was taken on the 10th by an American privateer, and was sent, with a prizemaster on board, to make the port of Boston. On the 30th of May, the plaintiff brought this action against Stupart, an underwriter on the policy, on which Stupart paid the premium into court, and pleaded the general issue. About the 6th of July, and before the trial, accounts were received that the ship had been retaken some time in May and carried into Halifax. The cause came on for trial before Lord Mansfield and a special jury. The defence set up was, that there were not thirty seamen on board the ship, according to the terms of the stipulation in the margin of the policy; and, in fact, it appeared upon the evidence, that, to make up the number, the plaintiff reckoned the steward, cook, surgeon, some boys and apprentices, and some persons described as men learning to be seamen; and that only twenty-six persons had signed the ship's articles. It also appeared, that there were seven or eight passengers on board. It was, for the defendant, contended that this was a warranty, not a representation, and that, being so, it must be literally and strictly complied with.

Lord Mansfield. The whole argument for the defendant turns upon begging the question. There is no doubt but that this is a warranty; its being written in the margin makes no difference. Being a warranty, there is no doubt but that the underwriters would not be liable if it were not complied with, because it is a condition on which the contract is founded. But the question is, whether, in this warranty, the word "seamen" was used in the strict literal sense or not? If it was, the warranty has not been complied with. It is a matter of construction: boys are reckoned seamen, not only at the Custom House and Greenwich Hospital, but in the distribution of prizes. I think the parties were not sanguine at the trial; the special jury and the bystanders were perfectly clear; they hardly seemed to think it a serious question in this cause. There is scarcely now such a thing as a ship entirely manned with seamen, strictly so called; even on board the King's ships they are satisfied with a few strict seamen, and able-bodied landmen make up the rest of the

When a certain number of "seamen," besides passengers, is specified in a warranty, the warranty is complied with if there is the specified number, including boys.

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crew. I had no doubt of the sense of the word in this policy, and the jury decided it. With regard to the other question, it was stated as a forlorn hope; but certainly, when the action was brought, there was no prospect of a recapture of the ship; she was considered as totally lost, in a remote part of the world. The report which afterwards prevailed of her being retaken, some months after the capture, was loose and general; no circumstances known, no accounts of her situation, nor of what part of the cargo might be saved. In short, there is no doubt but that it was a case where the owner might abandon. Rule discharged.

(e) *Of ship's safety.*

3. BLACKHURST v. COCKELL. T. T. 1789. K. B. 3 T. R. 360.

When a warranty is inscribed that the ship or goods were safe on a particular day, the warranty is satisfied if they were in safety at any time in the day the policy was effected. [312]

In an action on a policy on goods, dated 9th of December, 1788, lost or not lost, warranted well this 9th day of December, 1788, it appeared that the warranty was at the foot of the policy; that the policy was underwritten between the hours of one and three in the afternoon of the 9th of December; that the ship was well at six o'clock in the morning, but was lost at eight o'clock the same morning. Upon a motion to set aside a nonsuit, which had been entered, Lord Kenyon, Chief Justice, Ashhurst, Buller, and Grose, Justices, were clearly of opinion, that the warranty was sufficiently complied with, if the ship were in safety at any time that day; that the nature of a warranty goes to determine the question; for, as it is a matter of indifference whether the thing warranted be or be not material, and yet must be literally complied with, still, if it be complied with, that is enough; that there was good reason for inserting these words, because they protected the underwriter from losses before that day, to which he would otherwise have been liable, as the policy was on the goods from their lading; and thus too the words "lost or not lost." have also their operation.

(f) *To sail on or before a particular day.*

1. REDSDALE v. NEWNHAM. H. T. 1815. K. B. 3 M. & S. 456.

A warranty to sail on or before a particular day, means to sail equipped completely for the voyage.

A policy of insurance on freight and goods, per ship named, at and from Portneuf to London, warranted to sail on or before the 28th of October; and on the 26th, the ship dropped down from Portneuf, with an incomplete crew for the voyage; and on the 28th, reached Quebec, which was the nearest place where she could obtain a clearance, and there completed her crew, and on the 29th, obtained her clearance, and sailed the next day.

Per Cur. We thought the warranty contemplated a sailing upon the voyage, and that the ship's dropping down from Portneuf to Quebec without her complement of men showed that that was only preparatory to the voyage. The policy being "at and from," there is no doubt it attached at Portneuf; but, according to the reason of the thing, the policy must be taken distributive, and "warranted to sail on such a day" must mean to sail on her voyage, that is, when the ship could get her clearances, and sail equipt for the voyage.

2. MOIR v. ROYAL EXCHANGE ASSURANCE COMPANY. H. T. 1814. K. B. 3 M. & S. 461; S. C. 4 Campb. 84; S. C. 1 Marsh, 570; Taunt. 241.

Policy of assurance on ship at and from Memel to the ship's port of discharge in England, warranted to depart on or before a particular day.

Lord Ellenborough, C. J. I was of opinion at the trial that there was enough to bring the case within the previous actions. If this had been a warranty to sail, there was a sailing abundantly proved; but to depart, raises a question of grammatical construction. A warranty to depart on or before a particular day, is, I think, a warranty to be out of the port on or before that day. The object seems to be, that the voyage should be commenced out of the port at that time. The language of the underwriter amounts to this: I will be answerable for all perils upon the high seas, but let the vessel be well out of Memel by the 15th of September.

* The construction of such a warranty may be governed with reference to the point at which a ship is to be considered as having sailed by the usage of trade; *Long v. Anderdon*, 3 B. & C. 495.

A distinction is taken between a warranty "to sail" and one "to depart;" the latter means that the ship shall be out of port.

3. THELLUSON v. FERGUSON. E. T. 1780. K. B. Doug. 369.

Action on a policy of insurance on the French ship *L'Aimable Gertrude*, at and from Guadaloupe to Havre, warranted to sail on or before the 31st of December. It was tried before Lord Mansfield, when a verdict was found for the plaintiff. A motion having been made for a new trial, the case from his lordship's report appeared to be as follows: "The ship took in her complete lading and provisions for France, and all her clearances and papers at a port called *Pointe-a-Pitre*, in the island of Guadaloupe, and sailed from thence on the 24th of October for Basseterre, where there is no port, but only an open road. The town of Basseterre is the residence of the French governor. The ship arrived there at night, when the captain went on shore, and next day waited on the governor, who would not permit him to depart, and to prevent it took his ship's papers from him. At this place he was detained with his ship till the 10th of January, when he set sail with a convoy, which had arrived some little time before, and being separated after some days from the convoy the ship was taken by an English vessel. The captain, who was the only witness produced at the trial, swore that notice had been given on the part of the governor, some days before he sailed, to him and the other captains of ships at *Pointe-a-Pitre*, who were preparing to sail for Europe, that a convoy was expected to be at Basseterre from Martinico on the 25th October, and that in consequence of this intimation, he had worked night and day to get ready, and had paid extraordinary gratifications to obtain the ship's papers and clearances as soon as possible; that the desire of being in time for the convoy was the only reason for this haste, and that although he was not able to sail till the 24th, he was still in hopes of being in time for the convoy, as he thought it might very probably have been detained at Martinico some days beyond its time. The last ship papers which he received at *Pointe-a-Pitre* was *le role d'equipage*, or the muster-roll. This paper, which was much relied upon by the counsel for the defendant, was dated the 24th of October. and was in the following words: "Vu par nous charge du detail des classes au departement de la Grande terre Guadaloupe, l'equipage de nomme du role des autres parts, au nombre de vingt personnes, le capitaine compris, permis au Sieur Jean Jacques Lethuillier, commandant le navire *L'Aimable Gertrude*, du Havre, de s'enservir pour faire son retour, on dit lieu passant a la Basseterre, pour y prendre les ordres du gouvernement, en observant les ordonnances et reglemens de la marine." Under this there was written on the same paper an account, dated the 30th of October, of some changes in the number of the crew, and under that the following entry: "Vu par nous ecivain de la marine, change du detail des classes, les vingt cinq personnes existantes au present role, le capitaine a compris. Il est permis au Sieur Lethuillier, commandant le navire *L'Aimable Gertrude*, du Havre, de faire son retour, on dit lieu en se conformant aux ordonnances et reglemens royaux de la marine. A Basseterre, Guadaloupe, le 2 Janvier, 1779." On another paper, called *le conge*, dated the 16th of October, which was read on the part of the plaintiff, there was written at the bottom as follows: "Vu de relache a la Basseterre, Guadaloupe, pour y attendre un convoi pour France. Ce 28 Octobre, 1778, Monentheill." The captain swore that he understood the only reason for the conditions in the muster roll that he should go to Basseterre, where the convoy was to be at that place, was, that he might take such dispatches as were ready for Europe. He had not objected to it, because, in the regular course of his voyage to France from *Pointe-a-Pitre* he must have gone that way, close under the guns of Basseterre, in order to avoid Montserrat, there being no other road, except they were to keep quite to the leeward, which is not the custom. It he had arrived there in the day-time, he would not have cast anchor, but would have sent his boat for the dispatches; but having arrived at night, his ship had been detained, contrary to his intention and expectations. The defendant's counsel, to invalidate the captain's testimony, besides the muster-roll, and the entry under it as above stated, read the protest made by the captain on his arrival at Dover, and also his deposition in answer to the

If a ship, warranted to sail on a certain day, gets under [313] sail on the day, with intent to pursue her voyage, the war-ranty is complied with, though she be obliged to put back instantly by an embargo before she sets out of the harbour

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29th interrogatory in the proceedings in the Admiralty on the condemnation of the ship. The words of the protest on which they relied, were as follows:—“Whereupon he (the captain) waited on the proper officer at Point-a-Pitre for his muster-roll, and was by him informed it would not be granted but on condition that he should first sail to Basseterre, and there wait the direction of the general of the island.” And in a subsequent part, “Whereupon, at his (the captain’s) instance, the said John Nicholas Lethuillier, his father, came to Basseterre, and went with Messrs. Gobert and Botuet, commissioners of commerce, to the superintendent, and also to the general of the island, stating to them that the said ship and cargo were insured upon condition that she should have departed from the island of Guadaloupe before the 31st of December, the terms of which insurance they judged it essential to fulfil, notwithstanding which they were still refused permission to depart, and were kept there until after the 31st of December.” The deposition relied on was as follows:—“At the time the ship was first pursued and taken she was steering her course towards Brest. Her course was not altered upon the appearance of the vessel by which she was taken. Her course was at all times, when the weather would permit, directed to Brest, for which port she was directed to sail, although the destination was for Havre de Grace by the ship papers. She was not before, nor at the time of the capture, sailing beyond or wide of Havre de Grace. He was then about eight leagues west of Ushant, and her course was not altered to any other port or place, but was obliged to be directed to Brest, in consequence of the orders he had received subsequent to the delivering of the ship’s papers.” In answer to the 27th interrogatory his deposition was, “That all the ship’s papers found on board were true and fair, and none of them false or colourable.” At the trial the captain swore that he had received directions to keep in the course to Brest at Basseterre from his father, who had formerly commanded the ship; but this was the safest way in time of war of getting to Havre, which still continued to be the place of the ship’s destination. Upon this evidence the defendant’s counsel made two objections as grounds for a new trial: 1st. That there had been no inception of the voyage on the 20th of October, nor till after the 31st of December. 2ndly. That the ship never sailed on the voyage insured, viz. from Guadaloupe to Havre, but on a voyage from Guadaloupe to Brest. After both these points had been fully argued at the bar,

Lord Mansfield said: In my apprehension, there is no contradiction between the parol evidence and the protest and depositions. This captain had never heard of the case of *Bond v. Nutt*. Under an insurance at such a place as Guadaloupe, or Jamaica, the ship is protected in going from port in the island. But the question here is, whether the voyage was *bona fide* commenced, and stopped by accident? As to the condition about taking the orders of government, the ship could not sail from any port of the island without the governor’s leave. But the captain when he left Point-a-Pitre, expected to meet a convoy at Basseterre, and to proceed immediately without interruption. A convoy had been published, and he certainly would have gone to Basseterre at any rate, independent of the clause in the muster-roll. With regard to the second point, the voyage to Brest was at most but an intended deviation not carried into effect.

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4. *EARLE V. HARRIS*. E. T. 1780. K. B. Doug. 357.

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This was an action on a policy of insurance. The facts of the case appeared to be as follows: The policy was on the ship the *Leghorn Galley*, at and from Leghorn to Jamaica, with liberty to call at the windward islands, and from thence to Liverpool, warranted to sail from Jamaica on or before the 1st of August next. The ship had taken in her whole lading and papers, and set sail from the port of Savannah la Mar, in Jamaica, on the 1st of August, and went to Bluefields, which is at the distance of five miles; that it is the general place of rendezvous for convoy. On the 25th of July an embargo had been laid on all the ships in the island by the governor, and inserted in the public newspapers of that date. On the 1st of August, as soon as the ship had cross-

ed the bar, going out of the harbour of Savannah la Mar, the captain returned expecting in a boat and there made a protest against losses or damages sustained or to be sustained on account of the embargo, which protest he could not have made at Bluefields; he then proceeded the same day overland to Bluefields. At that place the ship was detained till the 9th of August, when a convoy arriving the embargo was taken off, and she sailed for England with the convoy, but afterwards separated from it and taken by an American privateer. The captain was examined at the trial, and admitted that he had heard of the embargo, but said he thought it was only meant to prevent ships from departing without the protection of convoy; that he expected to meet with convoy at Bluefields on the 1st of August, and that the embargo would immediately cease, and leave him to pursue his voyage the same day without interruption.

Lord Mansfield. Whether there was a *bona fide* sailing on the 1st of Aug. or not depends on the credit of the captain. He positively swore that he expected to find convoy ready at Bluefields that day, in which case the embargo would have ceased immediately. The jury have believed him, and have found accordingly. I dare say the captain never heard of *Bond v. Nutt*.

Willes, Justice. It appears to me evident, from the captain's conduct, that he did not mean sailing on the voyage. If he had intended to proceed directly, he had no occasion to quit his ship in order to make the protest. Upon the whole I think there was not a *bona fide* sailing on the 1st of August.

Ashurst, Justice. To be sure there ought to be a fair sailing, but the whole of the case has been before the jury, who have given credit to the captain. We must set aside the verdict as being against evidence if at all; and I do not think there is ground for a considering this as a verdict against evidence.

Buller, Justice. On the facts as stated by my brother Willes, I should have no doubt that the departure was colourable, but from the report, it appears that the captain thought he should find the convoy ready to sail immediately from Bluefields, and that the embargo would of course be taken off. If he had expected and meant to wait for convoy, it would not have been a sailing on the voyage; but the question is mere matter of fact, and the jury having believed the captain, I think we must be bound by their finding.—Rule discharged.

5. *WRIGHT v. SHIFFNER*. T. T. 1809. N. P. 2 Campb. 247; S. C. 11 East, 505.

A ship was insured at and from Surinam, and to call at any of the West India islands except Jamaica, to London, warranted to sail on or before the 1st of August. The vessel sailed before the 1st of August from Surinam, where she had taken in her homeward cargo, and arrived at Tortola, one of the West India islands, on the 4th, to find the convoy; but the proper convoy having before that time sailed with the trade, she afterwards took sailing instructions from another ship as convoy, and was lost in her voyage home. The underwriters contended, that by the terms of the policy the vessel ought to have sailed from the last of the West India islands at which she meant to touch on or before the 1st of August, and that her sailing from Surinam for Tortola, so as not to arrive there in the ordinary course till the 4th, and consequently not being able to sail from Tortola till after the 1st, was a breach of the warranty, and precluded the plaintiff from recovering. But the Court were of opinion that there was a *bona fide* compliance with the terms of the warranty, according to the meaning of the parties. homeward voyage on or before the specified time, although she afterwards touch at another of the West India islands to join convoy.

6. *HORE v. WHITMORE*. E. T. 1778. K. B. Cowp. 784.

This came before the Court upon a rule to show cause why the verdict given for the plaintiff in this case should not be vacated, and judgment entered for the defendant, as in the case of a nonsuit. The declaration stated, upon a policy of insurance of the ship *New Westmoreland*, at and from Jamaica to London, warranted to sail on or before the 26th of July, 1776, free from capture, and from all restraints and detentions of kings, princes, and people, of what nation, condition, or quality soever; the said ship was preparing and ready

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quality soever;

the said ship

was preparing

and ready

to sail on or

before the 26th of July, was restrained from sailing at that time by the order of the governor of

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Jamaica, the policy was holden to be void, although it contained the usual clause against restraint of princes, &c. If a ship, insured at and from Jamaica, warranted to have sailed on or before a particular day, sail before the day from her port of loading with her cargo, &c. on board, to the usual place of rendezvous at an other port of the island for the sake of joining the convoy these ready, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day.

to sail, and would have sailed on the 25th of July, on her intended voyage, if she had not been restrained by the order and command of Sir Basil Keith, the then governor of Jamaica, and detained beyond the day; that she afterwards sailed and was captured, &c. It was objected, that the usual clause against the detention of rulers and princes being inserted in this policy, the embargo by which the ship was prevented from sailing on the day mentioned in the warranty, came expressly within the meaning of it; and therefore excused the delay; and contended that the loss of the ship could in no possible respect be connected with the embargo; that the warranty was positive and express that the ship should depart on or before the day appointed, and therefore must be complied with. And of this opinion were the Court. Accordingly, the rule was made absolute.

7. BOND v. NUTT. E. T. 1777. K. B. Cowp. 601.

This was an action on a policy of insurance upon the ship *Capel*, in the West India trade, lost or not lost, at and from Jamaica to London, warranted to have sailed on or before the 1st of August, 1776. The policy was effected on the 20th of August, 1776, at a premium of fifteen guineas per cent.; to return five per cent. if the ship departed with convoy, and eight per cent. if with convoy for the voyage and arrived safe. At the trial there was no controversy about the facts, and they are shortly these: The ship was completely laden for her voyage to England, at St. Anne's in Jamaica, and sailed from St. Anne's Bay on the 26th of July, for Bluefields, in order to join the convoy there, Bluefields being the general place of rendezvous for convoy on the Jamaica station, like Spithead in England, and where a convoy then lay, which was expected to sail for England every day; but the greater part of the way from St. Anne's to Bluefields is out of the direct course of the voyage from St. Anne's to England; that she arrived off Bluefields on the 28th or 29th of July, where she was immediately stopped by an embargo laid on all vessels being in any port of Jamaica, and was detained there till the 6th of August, when she sailed with the convoy for England, but afterwards, being separated in the passage, was taken by an American privateer. Upon these facts the jury found a verdict for the defendant.

Lord Mansfield. I am extremely glad this motion has been made. The cause came on at Guildhall, by the candour of the parties, in the fairest manner; but I had no intimation of its being a cause of consequence till after the verdict, when I was informed 100,000*l.* depended upon it. The question was fairly tried, and the case has been very well argued on both sides. I have thought much of it since the trial; some things are clear, and there are some which require consideration. The policy was made on the 20th of August, 1776, upon the contingency of a fact which must have existed one way or the other at the time the policy was underwritten; that contingency was, that the ship should have sailed on or before the 1st of August; consequently it must have taken place or not upon the 20th of that month. The port from whence the ship was to be insured was, if I may use the expression, the whole island of Jamaica, but from which of the ports the ship would sail neither party knew; therefore they have used the words "at and from Jamaica," by force of which she certainly was protected in going from port to port until she sailed. It follows that the word "sailed" in the warranty must mean that she had sailed on her homeward-bound voyage. The question then is a matter of fact, and one that admits of no latitude, no equity of construction or excuse. Had she or had she not sailed on or before that day? That is the question. No matter what cause prevented her; if the fact is that she had not sailed, though

* A French ship warranted to sail from Guadaloupe on or before a day certain, if she take in all her cargo and leave her port of lading before the day, and sail to another port of the island in the direct course of her voyage, merely in the hopes of joining convoy, and to take the governor's despatches to France, the warranty is complied with, though the governor there should detain her beyond the day; see *Theobaldson v. Ferguson*, Doug. 261; *Theobaldson v. Naples*, id. 266. n.

she staid behind for the best reasons, the policy was void; the contingency [518] had not happened; and the party interested had a right to say there was no contract between them. Therefore, what was said by the counsel in the argument is very true, if she had been prevented by any accident from sailing till the 2nd of August, as by the sudden want of any necessary repair, or if an enemy had been at the mouth of the ports, the captain would have done very right not to sail, but there would have been an end of the policy. It is very different from the cases where a voyage has begun, there the usage of the voyage may justify going a little out of the direct course. This also is clear, if the ship had broken ground and been fairly under sail upon her voyage for England on the 1st of August, though she had gone ever so little a way, and had afterwards put back from the stress of weather or apprehension from an enemy in fight, or had then been put under an embargo and been detained till September, it would still have been a beginning to sail, and the stoppage would have come too late, because the warranty was upon a fact antecedent. Such a case happened before me a day or two after the present action was tried. It was an insurance upon a ship from Grenada to London, warranted to sail on or before the first of August; she had barely begun to sail on the day, when she was stopped by an embargo, and detained beyond the time. I thought the voyage was begun, and the jury were of that opinion, and there has been no motion for a new trial. I am giving no opinion, only breaking the case. Here the whole question turns upon this,—did the voyage from Jamaica homeward begin from St. Anne's or from Bluefields? Perhaps, where a voyage is once begun, the going a little out of the way to join convoy may be very reasonable, and for the benefit of all parties, but still it does not vary the fact of sailing. Here it was very reasonable; but the question whether the voyage began at St. Anne's or Bluefields still remains. Another material circumstance arises from the words "at and from Jamaica." At the trial I reasoned thus: by the terms of the policy she was protected during her stay at Jamaica; by force of them she had a right to go to any port or all round the island, and she went to Bluefields, for reasons best known to herself; therefore the voyage began from Bluefields. Had the insurance been at and from the port of St. Anne's it did strike me that going round the island to Bluefields would have been a deviation. But this is a question of so much value and consequence that the Court wishes to consider the case thoroughly before they give a final decision upon it.

(g) *Free from capture in the port of discharge.*

1. JARMAN v. COAPE. E. T. 1811. K. B. 13 East, 394.

British goods on board a neutral ship, being insured from London to any ports or places of discharge on the continent, &c., with liberty to carry simulated papers, &c., free of capture or seizure in her port or ports of discharge; and the ship having received instructions to proceed to the river Jahde, with a supercargo, who, when arrived there, was to go to Varel, which lies 30 miles up the river, and there give notice to a correspondent of the ship's arrival, where the goods might most safely be landed, Varel and the whole adjacent country being then occupied by the enemy; the Court held, that a seizure by the enemy in boats from the shore, while the ship was lying on and off in the middle of the river fifteen miles up, where it is two miles wide, waiting for directions from the supercargo, who had gone up to Varel, to get instructions where to land the cargo, was a seizure in a port of discharge within the exemption in the policy; for the intention of the contracting parties was plainly to exempt the underwriters from land risks in any such place of discharge, leaving them subject only to sea risks; and, therefore, the word "port" must be taken in its general and most extensive sense, as contradistinguished from the high seas, with reference to the subject matter; though the place where the seizure was made was not ordinarily denominated a port, nor were goods used to be landed there in the accustomed course of commerce.

If by a policy the ship is warranted "free of capture and seizure in her port or ports of discharge," and she is taken in an open river, not within the limits of any regular port, of any regular port, as a place of discharge her cargo in a clandestine manner, the place where she is taken is to be considered her port of discharge with in the meaning of the policy.

Where a ship, insured, is warranted free from capture and seizure in the port of discharge, and being destined to Pillau, is seized while lying at anchor in Pillau

roads, in order to discharge part of her cargo, to enable her to enter the harbour, this is not a seizure within the warranty.

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A capture by a force issuing from the port of discharge is an immaterial circumstance in construing a warranty against capture in the port of discharge.

2. *BROWN v. TIERNEY*. E. T. 1809. C. P. 1 Taunt. 517. *S. P. LEVY v. VAUGHAN*. E. T. 1812. C. P. 4 Taunt. 387. *sed vide MAYDHEW v. SCOTT*. K. B. 1812. N. P. 3 Campb. 205. *DAGLISH v. BROOK*. E. T. 1812. N. P. id. 205. *BARONY v. VAUX*. M. T. 1810. N. P. 2 Campb. 541. *JARMAN v. COAPE*. E. T. 1811. K. B. Blac. 394; S. C. 2 Campb. 613.

It appeared that the vessel was bound for Pillau; that there is a harbour at Pillau, rendered difficult of access by a shifting bar, on which the water is too shallow to admit vessels deeply laden; that without the bar, and distant four or five miles from the Custom House, is a station called Pillau roads, where ships bound for Pillau, which draw much water, usually bring to and unload some part of their cargo, to lighten them sufficiently for passing the bar. The Robert came to an anchor in Pillau roads, and a pilot went on board her there, who would not permit any thing to be unloaded till the ship's papers had been examined and approved at the Custom House. The supercargo having gone on shore with the papers for this purpose, the vessel while lying in the roads was taken by a French privateer. The jury found a verdict for the plaintiff. The Court held, that the meaning of the warranty was, that for whatever purpose the ship went into a port, if the enemy got down to the port by land and took her, the underwriters in that event should be discharged. But in this case the ship was as much at open sea as ever she had been; nor was it proved to be even the practice wholly to discharge a ship in Pillau roads, but only to lighten her sufficiently to enable her to enter the harbour. And they refused the rule. See 15 East, 269.

3. *MELLISH v. STAMFORTH*. E. T. 1810. C. P. 3 Taunt. 499. *S. P. LEVY v. VAUGHAN*. E. T. 1812. C. P. 4 Taunt. 389.

It was proved that at the time of effecting this insurance the circumstance of the warranty contained in this policy made the difference of one-half in the premiums upon this risk. The vessel having on the 20th of August taken a pilot on board at Poehl, who informed the master that the French were in possession of Wismar, came to an anchor in the open sea, at the south point of the isle of Poehl, about one German mile and three-quarters, or seven English miles distant from Wismar, at which place she was destined to deliver her cargo, not within the reach of any guns from the shore; and on the same day, about five hours after, eight French soldiers came off in a boat from Wismar and took possession of the vessel; and on the following day a French officer coming off, ordered the ship under weigh, and brought her to an anchor three or four miles further in, but in the roads of Wismar, not in the harbour, as she drew too much water to enter the harbour of Wismar, in which were only eight or nine feet of water. The captors discharged her cargo in the roads, and carried it on shore in lighters. The master of the vessel and other witnesses proved that he could have gone further in, within two English miles of the harbour; that the place where he cast anchor was not within the port of Wismar; that vessels do not discharge their cargoes there, but usually approach four English miles and a quarter nearer to Wismar before they begin to discharge their cargoes; that there were two fathoms water in Wismar roads; and that this vessel, which drew not more than eleven feet water, could have safely gone in within three English miles of the shore. The reason why the pilot did not carry him into Wismar roads, immediately on his coming on board, was, that, although the wind was fair for him to carry the ship in, it was not fair for him in case of danger to get out again. The Chief Justice being at that time of opinion that it was a question of law, whether the vessel were in part within the meaning of the warranty?

Per Cur. In this case, the jury certainly were struck with that which is obvious to every one; that if a captain, acting either with or without the orders of his owner, means to be taken, he was as certain of being captured in the

* When the ship and goods are warranted free from confiscation by the government in the ship's port or ports of discharge, the confiscation referred to by the warranty must be an act done on the part of the government of the country where it takes place; see 15 East, 269.

situation where this vessel anchored as in port; so that if he were disposed to practice fraud, it might be very easily practised. Here the ship waits five hours off the south end of the isle of Poehl. The master being asked, why he did not weigh anchor and depart when he saw the soldiers approaching, said that the wind was fair to go in, but not to come out. But the difficulty is how to say, in the words of the warranty, that the ship was within the port; if she were within her unloading ground, that would be a strong ground to say she was within the port, though not literally; but here she is four miles from the roads; and if four miles will not protect her, we do not see how five would; nor do we see how we can say that the plaintiff has not a right to recover. Whether the underwriters can form a warranty to meet the mischief in some other way may be considered; the warranty might be against any force in or issuing from the port of discharge.—Rule discharged.

See *Cockey v. Atkinson*, 2 B. & A. 450.

4. *KEYSER v. SCOTT*. M. T. 1812. C. P. 4 Taunt. 660.

This was an action upon a policy upon the ship *Jason*, at and from London to any port or place in the Baltic, with liberty to seek and join convoy, carry and change simulated papers, to touch and stay at all ports or places in the Baltic or elsewhere for orders or information, and in case the master should find it dangerous to enter any port or place to return; and the ship was warranted free from capture in her port of destination. The case was tried before Mansfield, C. J., when it was proved that the *Jason* came to an anchor over against Pillau, on the outside of the bar, at a distance of full a German mile farther out than any place where vessels ever are known to lighten their cargoes in preparation for coming in over the bar. While she was lying there she was taken by a boat with some Pomeranian soldiers, coming out of Pillau. They took out no part of her cargo at the place where she then lay, but carried her in, until she was within a German mile from the shore, where they took out the first part of her cargo. The place where ships usually begin to unload is a German mile from the shore.

Per Cur. We have no doubt the underwriters intended to protect themselves against the risk of that loss which has occurred, but unfortunately they have used terms which do not protect them. They have unfortunately referred for their definition of the risk to the place where the capture was to be made; and the place where the capture was made is, according to the only witness who knew any thing about it, in the open sea. If the underwriters will not be more careful how they express their meaning they must suffer for it. The rule must be discharged.

5. *LIVIE v. JANSON*. T. T. 1810 K. B. 12 East. 648.

In an action on a policy on ship and goods, warranted free from American condemnation, it appeared that the ship and goods were damaged by the perils of the seas, and were afterwards seized by the American government, and condemned. The Court held, that the total loss by subsequent seizure and condemnation took away from the assured the right to recover in respect to the previous partial loss by sea damage, inasmuch as the immediately operating cause of total loss was one from which, and its consequences, the underwriter was, by express provision in the policy, exempted, and as the other antecedent causes of injury never produced any pecuniary loss to the plaintiffs, and as there never existed a period of time prior to the total loss in which the assured could have practically called on the underwriter for an indemnity against the temporary and partial injury.

6. *O'REILLY v. ROYAL EXCHANGE ASSURANCE COMPANY*. T. T. 1815. N. P. 4 Campb. 246.

Action on a policy of insurance on goods in the *Catherina*, at and from La Guayra to the ship's port of discharge without the Baltic and north of Gottenburgh, with liberty to touch at a port in England for orders, and also with liberty to join convoy at the place of rendezvous in the West Indies; warranted to depart finally for Europe on or before the 1st of August, and also warranted free of capture and seizure, and the consequences thereof in port, in La Guay-

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A ship captured at an anchor with out the caput portus in a place where ships do not unload, is not within a warranty of free from capture in her port of destination.

When a loss is occasioned by the event embraced by this species of warranty, the insured cannot recover for a partial sea damage which the ship had sustained in a previous part of the voyage.

And the insured cannot deviate from the usual

course, in order to avoid the excepted perils; for that would

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be to throw
the liability
upon the
underwri-
ters by an
indirect
course,
when they
would
have been
exempted if
a direct
course had
been pur-
sued;

After, if
there had
been no
warranty
inserted in
the policy.

ra at twelve guineas per cent., to return two per cent; if the ship should not touch at Jamaica or the Havannah and arrive; with other returns not necessary to be specified.

Gibbs, C. J., was clearly of opinion that under these circumstances the plaintiffs were not entitled to recover. He attached particular weight to the warranty in the policy against capture and seizure in port; to avoid a loss of that sort, for which the defendants would not have been liable, the ship cut her cable, and proceeded to sea in a state in which she was not properly fit to perform the voyage home. After that she goes to a port out of the course of the voyage to unload her outward and to complete her homeward cargo, without any liberty for that purpose; she might do so, to be sure, but not at the risk of the underwriters.—Plaintiffs nonsuited.

7. O'REILLY V. GONNE. T. T. 1815. N. P. 4 Campb. 249.

Action on a policy of insurance on the freight of the same ship, in the same voyage mentioned in the preceding case. The risk here was described to be at and from La Guayra, and any port or ports, place or places, on the Spanish Main, all or any, to any port or ports in the North Sea, not in the Baltic nor northward of Gottenburgh, all and any, with liberty to call at all or any of the West India islands, colonies, and settlements, at Gibraltar, any port or ports in Spain without the Straits, and at any port or ports in England, to wait for orders, or for any purposes whatsoever, all and any, warranted to sail on or before the 1st of August, 1814. And to the usual words "giving leave to touch and stay at any ports or places whatsoever," were subjoined the following words in writing. "And wheresoever, to seek, join, and exchange convoys, load, unload, and reload goods and specie, wait for orders, or for any purposes whatsoever, all or any, without being deemed any deviation."

Gibbs, C. J. This case is widely different from the last. There the ship was warranted free of seizure in port; but this policy is without any such exception; she was, therefore, unquestionably under its protection when she sailed light from La Guayra; and the present underwriters, who would have been liable had she been seized in port, can make no objection that she was unable to bear up to St. Thomas's; she was forced to sail light, and was unable to pursue the direct voyage home; finding it impossible to make St. Thomas's it will be for the jury to consider whether Jacmel was not, under all the circumstances, as convenient a port as she could have selected.—Verdict for the plaintiffs.

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(H) RELATIVE TO CONVOY.*

1. WAKE V. ATTY. T. T. 1812. C. P. 4 Taunt. 493.

It is *prima facie* legal to sail from a foreign port with out convoy;

This was an action upon a policy of insurance upon the ship *Monarch* and freight, at and from Malta to Gibraltar and Lisbon; to return four per cent. for convoy to Gibraltar, three per cent. for convoy from thence to Lisbon, and twelve per cent. for such proportion of the freight as was due for the cargo discharged at Gibraltar, and twelve per cent. if the voyage terminated at Gibraltar. It further appeared by a letter from the master of the vessel, which had laid some time at Malta, waiting for freight, that he had at length chartered her for this voyage, to sail without convoy. The owner knew this at the time when he gave instructions for the policy; but it also appeared by the same letter that it was not known when any convoy would be appointed. The vessel had no license to sail without a convoy. It was contended that the charter-party was therefore illegal; and that although the owner was not instrumental to the sailing without convoy, yet that as he afterwards was aware of the fact of her having sailed without convoy, before he gave the instructions for this policy, that was such a privity as rendered the insurance void. The jury found a verdict for the plaintiff.

Per Cur. With respect to the convoy, we have not the slightest doubt that

* The obligation to sail with convoy is imposed upon the insured, either by the express terms of a warranty, or by act of parliament. The statute 43 Geo. 3. c. 57. rendered it highly penal for ships belonging to any of his Majesty's subjects to sail without protection of the convoy appointed by government.

the statute did not intend to affect the policies of any who are not privy to the sailing without convoy. The eighth section of the 43 Geo. 3. c. 57. excepts all vessels sailing from foreign ports, where no convoy is appointed, nor any person there duly authorized to appoint convoys or to grant licenses. It does not appear in this case either that any convoy was appointed from Malta, or that there was any person there authorized by the Admiralty to grant licenses to sail without convoy; unless this, therefore, was shown in the cause, it is not shown that the master did illegally in sailing thence without convoy.

2. *WAINHOUSE v. COWIE*. M. T. 1811. C. P. 6 Taunt. 178.

On the question, whether a license to sail without convoy to a port which a ship must pass on her voyage was not a sufficient license to authorize her to run, without license or convoy, for the residue of her voyage, after she has touched at that port.

Per Cur. At the trial it was proved that the ship sailed without any convoy for this voyage with the privy of the plaintiff. The ship was advertised as a running ship; it was perfectly well known she was to be a running ship, to sail without convoy for this voyage. The defendant has a right to avail himself of this objection, if the plaintiff with his privy did put his good on board without convoy for this voyage; but it has been argued, that the plaintiff's privy alone will not vacate the policy, but that he must be instrumental. Now this is directly contrary to the words of the statute, which are "privy to, or instrumental in." It is not necessary to decide what makes a man instrumental, but it was never before thought that "privy" and "accessary" meant the same thing; and that the plaintiff is privy is no doubt, and the clause applying to persons privy or instrumental; if he is privy, his insurance is void. But it is said that the plaintiff is protected by section 6. of the 43 Geo. 3. c. 57., which exempts from the operation of the act ships sailing with a license; and that although the act nowhere uses the expression, that the policy shall be void if the ship with the owner's privy sails without a licence, yet if the ship did sail without a licence, the owner of the goods not being privy to the want of a licence, he shall not incur the forfeiture. But it would be a strange thing indeed to insert in such an instrument as this, that the shipper knows the ship is to sail without a licence. It cannot be necessary, the plaintiffs say, that every shipper of goods must know and see that a proper licence is obtained. The first answer is, every person shipping goods must know and see that a sufficient licence is given. In the next place, what is the captain but the agent of the shipper in respect of those goods, and does he not therefore apply for a licence as such agent? But every shipper of goods may go and inquire at the Admiralty whether such a licence was granted or not; and every merchant knows it is not the practice to grant licences for ships going up the Mediterranean. It is impossible to say then, on these two clauses, but that the plaintiff has offended against this act, the voyage being without convoy, and with his knowledge, and no sufficient licence having been obtained.

3. *DARBY v. NEWTON*. E. T. 1816. C. P. 2 Marsh. 252; S. C. 6 Taunt. 544.

Action on a policy of insurance, dated the 23rd December, 1811, on goods on board the ship *Sybella*, at and from London to Cagliari, in Sardinia, with liberty to touch at Gibraltar, and there unload and load goods, and with or without convoy. At the trial before Lord Chief Justice Gibbs, the following ship which carried of the *Sybella* was proved as having been shown to the plaintiff before he put his goods on board: "Has a license to sail immediately without convoy, the remarkably fast sailing fine British ship, coppered, and armed, &c., the greatest part of her cargo actually engaged, and on board, for Gibraltar, Cagliari, and Majorca, with leave to take in goods at Gibraltar, the *Sybella*, J. Bowden, Commander; burthen, 170 tons; lying at Horselydown for freight. Apply, &c." It appeared that she sailed from London in the beginning of January, 1812, with a license from Gibraltar only, where she arrived on the 22nd of the same month; that the admiral stationed at Gibraltar, Commodore Penrose, was authorized to extend such licenses for ships to pro-

But where it is known to the assured of goods that the ship is to sail with out convoy, the event of her being daily licensed will alone protect him.

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And where a person in ares goods on board a ship which he knows is to sail without con voy, he is bound to see that she has a sufficient licence for the whole of the voy age.

ceed without convoy, as might have been granted here, or to furnish new licences when advisable; but that she sailed from Gibraltar without either convoy, or license, and was captured in the prosecution of her voyage. There was no proof that the plaintiff knew the extent of the license, or had received any [325] intimation that the ship was to sail without convoy, except from the card above state. A verdict was found for the plaintiff, subject to the opinions of the Court. On the question whether the insured were barred from recovering by the want of a license from Gibraltar,

Lord Chief Justice Gibbs. I should have been very glad to have found any ground on which the plaintiff could have escaped from the effect of this objection, because he has not been personally to blame in any thing that has been done, and it is therefore hard that the loss should fall on him through the neglect or mistake of others. But I cannot find any ground on which this case can be taken out of the law, which has been so much considered, and at last determined by the case of *Wainhouse v. Cowie*, confirmed by that of *Ingham v. Agnew*. The principle to a ship's sailing without convoy and without licence is very different. By the 4th section of stat. 43 Geo. 3. c. 57. all insurances, whether upon the vessel or on goods belonging to any person privy to the ship's sailing without convoy, are made void; so that if the insured be privy to her sailing without convoy, the insurance is void, unless he can protect himself by any other part of the statute; and the 6th section does protect him, provided the ship have a licence. But there is this distinction, "sailing without convoy, and without a licence;" that though the ship do sail without convoy, yet, if the insured be ignorant of it, the insurance is valid; but if he be acquainted with that circumstance, the insurance is void, unless there be a licence; he is therefore bound to inquire into that fact, because his ignorance of it will not excuse him. In *Wainhouse v. Cowie*, the voyage insured was from London to Palermo, with liberty to call at Gibraltar. The ship was put up as a running ship, and the insured, who was the owner of goods, knew that she was to sail without convoy, but supposed she would have a sufficient licence, unfortunately not inquiring what licence she had. The ship sailed with a licence to Gibraltar only, where she arrived safe; and there being no person there with authority to extend the licence, she proceeded without one, and was captured. Now, supposing the licence from this country to have been sufficient, she would have been excused, by the 8th section, from sailing with convoy from Gibraltar, because there was no person there at the time with authority to appoint convoy or grant licences. But the Court held the policy to be void, on the ground that the voyage being to Palermo, the licence to Gibraltar only was insufficient, though the ship touched at Gibraltar. I cannot distinguish that case from the present. The voyage here is to Cagliari, with liberty, and with an intention, to touch at Gibraltar, but the ultimate place of destination is Cagliari; and, though the captain was aware of that circumstance, he got a licence to Gibraltar only. I am of opinion that that licence was insufficient, on the same ground as that of *Wainhouse v. Cowie*. It has been attempted to distinguish that from the present case, on the ground that the latter there was a person at Gibraltar authorised to grant licences from thence; and certainly such an authority did exist. To what cases it was meant to apply I cannot tell; it may be, to ships which had sailed to Gibraltar as their ultimate place of destination, and had afterwards resolved to proceed; and such a course as that would have been perfectly legal, because the licence to Gibraltar would have been good and effectual in the first instance, and the admiral would have given further effect to it if the party chose to proceed. But that makes the case of the insured in the present instance still more desperate, because it was incumbent on the plaintiff to get such second licence; and though it does press very hard on a person insuring goods, that he should suffer from the neglect of the captain, still if he will load his goods on board without ascertaining that a valid licence has been obtained, he must do it at his own peril. For all these reasons I am of opinion, though I arrive at that conclusion with regret, that the plaintiff is not removed out of the scope of the act.

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4. *SILLY v. ERVES*. H. T. 1779. K. B. Doug. 72.

This was an action for money had and received brought against an underwriter for a return of premium. The policy was on the ship the *Parker Gallery*, at and from Venice to the Currant Islands, and at and from thence to London, at a premium of five guineas per cent., to return 2l. per cent. if the ship sailed with convoy from Gibraltar and arrived. The ship touched at Gibraltar on her way home, and sailed from thence under convoy of the *Zephyr* sloop of war; but the convoy was destined only to go to a certain latitude, about as far as Cape Finisterre, being ordered on the Lisbon station, and accordingly the ship and convoy separated, and the ship arrived safe at London. The only question in the cause, was, whether by the terms of the policy, the condition for the return of premium was a departure from Gibraltar with such convoy as could be met with, for whatever part of the voyage that might happen to be, or a departure with convoy for a voyage. A rule was obtained to show cause why there should not be a new trial on the words.

Mansfield, C. J. I was strongly of opinion, that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy which might be designed to separate from the ship in a minute or two; though, when convoy for the whole of a voyage is clearly intended, an unforeseen separation is an action to which the underwriter is liable; for the meaning of such a warranty is not that the ship and convoy must continue and arrive together. But I still think that the evidence was properly admitted at the trial of this cause, because the sense contended for by the plaintiffs was not inconsistent with the words of the policy, and, therefore, it was material to see what the usage was. I laid great stress on Mr. Gorman's testimony. I did not consider him as a common witness. However, it seems from what I have heard since, that people in the City are dissatisfied with the verdict, and think the evidence of the plaintiff's witnesses was founded on a mistake. Certainly critical niceties ought not to be encouraged in commercial concerns, 2 B. & P. 168. and multiply them, you also multiply doubts and criticisms. It may be hard, because words have been added in some instances to force a construction in this case from the omission of them. The question is of great importance.—The rule made absolute.

5. *D'EQUINO v. BERWICKE*. M. T. 1795. C. P. 2 H. B. 551. S. P. SMITH | 327 |
v. *RENDSHAW*, AND *DE GORY v. CLAGGET*. M. T. 1780. C. P. 2 Park, Ins 510.

In an action on a policy on the ship *Little Betsey*, at and from London to St. Sebastian, warranted to sail with convoy. The ship sailed with other vessels, under convoy of several ships of war; and after a certain latitude, the *Weasel*, one of the men of war, was detached to convoy the Spanish ships; but the captain of that ship had orders to go with the St. Sebastian ships no further than B. lboa, and in fact he went no further. A verdict passed for the plaintiff. When the case came on before the Court, on a motion for a new trial, it was argued for the underwriters, that warranties are to be strictly complied with; and that, however near the port of St. Sebastian might be to B. lboa, yet the principle was the same; and that a convoy to the latter place could no more be construed to be a convoy to the former, than a convoy to the Cape of Good Hope could be a convoy to the East Indies; and for this was cited *Hibbert v. Pigou*, Park, Ins. 359.

Mr. Justice Buller. The case of *Hibbert and Pigou*, is not applicable to this, for there a convoy was appointed and actually sailed from Jamaica to England. As to the instance put at the bar, of a convoy to the Cape of Good Hope, I entirely differ from the counsel on that point; for if government thought a convoy to the Cape was a sufficient protection to the East India trade, and the usage were for the East India ships to sail with a convoy only to the Cape and to consider that as the East India convoy, and no other convoy was appointed to the East Indies, I should hold that the warranty was complied with;

* A sailing with convoy to the general rendezvous is a sailing with convoy for the voyage; *Anon.* 1 Marsh. Ins. 373.

A warranty to sail with convoy means the usual convey for the voyage, and not a mere departure with com

The term "convoy for the voyage," means such a convoy as shall be appointed by government.

When there is a warranty to depart from England with convoy, the voyages from the port at and from which the ship is insured to the port of convoy, and thence to the port of dis-

[323] charge, are considered as distinct.*

though I agree, if there was another convoy to the East Indies, it would be otherwise. The captain of a merchant ship has nothing to do with, nor can know, the instructions from the Admiralty to the King's officers, but must take such convoy as he finds. I am, therefore, of opinion that there is no ground at all for this motion.

6. *ROTHWELL v. COOKE*. M. T. 1797. Dom. Prac. 1 B. & P. 172.

The policy was on a ship at and from Hull to Bilboa, warranted to depart from England with convoy. The ship sailed from Hull to Portsmouth, and thence departed with convoy, which not being direct for Bilboa, she afterwards left and was captured. The warranty not having been complied with, the plaintiff would have been nonsuited, but it was insisted that he was entitled to a verdict for the premium, which was found accordingly. On motion to set aside this verdict, Eyre, C. J., said: The verdict now stands for the return of the whole premium, and the question is, whether it should stand for the whole, for none, or for a part? If for a part, I do not know how we are to settle it; it must depend on there being or not being some rule to be found to direct us in making the decision. Certain it is that, if the ship had been lost in coming round to Portsmouth, the underwriters would have been liable; it is not, therefore, reasonable that they should have been so liable without retaining a proportion of the premium; you should inquire whether there is any rate of premium among the underwriters from Hull to Portsmouth; and whether the premium has ever been appointed where there has been only one insurance without distinguishing the different risks in the policy. If you can find any rule, I recommend you to adopt it. But if you cannot agree, I think the whole premium ought not to be returned; and therefore the present verdict must be set aside, and the case go to a new trial.—Rule absolute.

7. *LAROCHE v. OSWIN*. H. T. 1810. K. B. 12 East, 131.

The taking in goods after the convoy's signal to weigh does not vacate a policy on goods, if no delay is thereby occasioned.

The goods in question were shipped by Mr. Ausset, on whose account the insurance was made, and formed part of a large cargo shipped by various persons at Gottenburgh. The ship sailed from thence bound to Memel, or Lisbon, on the 22nd of May, 1809, under convoy of the Thunder bomb-vessel. On the 26th the fleet anchored in Malmoe roads, and on the 3rd of June got under weigh again, but, in obedience to a signal from the commodore, returned to Malmoe roads, and remained at anchor there until the 9th, on which day, about half-past twelve, the commodore made a signal to prepare for sailing, and about an hour afterwards the signal to weigh; but before the signal for weighing was made, a boat came alongside the Juno, with eleven small boxes and two parcels of indigo, which were taken on board about the time when the last mentioned signal was made; about three o'clock she got under weigh with and was amongst the foremost of the fleet, which consisted of seventy-six vessels, when she unfortunately ran aground, and was with some other vessels of the fleet captured and burnt by a Danish gun-boat at some distance from the road, and not in any port. The indigo was not part of the original intended cargo, but had been ordered by some merchant on board the ship, with whom Mr. Ausset had no concern, after the arrival of the ship at Malmoe, and was brought off from the shore as soon as it arrived from up the country; Mr. Ausset was not interested in it. The time consumed in taking it in was not more than from ten to twenty minutes, and bulk was not broken for the purpose of stowing it away, but it was stowed on the cable stage. No delay was occasioned by the taking it in, and the ship got under weigh as soon as she could otherwise have done.

Per Cur. The risk insured was neither enhanced or varied, but something was done in the course of the voyage which made no difference in either; and therefore, was no discharge of the underwriter's liability. The case of *Stitt v. Wardell*, and *Sheriff v. Potts*, in which a different opinion had prevailed, were duly considered and overruled by the Court in *Raine v. Bell*, which governs the present.

* An unforeseen separation from convoy is no breach of the warranty to sail with convoy; see *Doug. 74*. But where a ship gets under weigh with the convoy, but waits some time for the master to come on board, whereby she loses her position in the convoy, this is a breach of the warranty, and the underwriters are discharged; 1 Marsh. Ins. 381,

8. HESSELLON v. ALLNUTT. H. T. 1813. K. B. 1 M. & S. 46.

Goods were insured from Heligoland to Memel, with liberty to touch at any ports, and to seek, join, and exchange convoy, warranted free from capture in the port of Memel; and the ship sailed from Heligoland with orders to go to Gottenburgh, to know whether proceed to Anholt or Memel, and was captured in her way to Gottenburgh, which is in the track either to Anholt or Memel. The Court held, that this was to be considered as a voyage to Memel, although it was subject to be changed according to circumstances upon the ship's arrival at Gottenburgh, and, therefore, the risk commenced on her leaving Heligoland; and the ship having never reached Gottenburgh, the purpose of going thither for orders was merely an intention to deviate, which did not vacate the policy; neither was it a restraint on the captain's judgment as to the place of seeking convoy, it not appearing that he could have met with convoy before the capture; and consequently the underwriter was liable.

9. WARWICK v. SCOTT. M. T. 1814. N. P. 4 Campb. 62.

Action on a policy of insurance. The policy contained a number of rules and regulations, that during war between this country and America, ships will not be insured against enemy risk, when sailing to and from the West Indies, South America, or any of the British settlements in North America, across the Atlantic, or to or from any island in the Atlantic, or in the Mediterranean seas, unless they sail with convoy, but not to be liable to the capture of other ships whilst so uninsured. But ships to be allowed to sail from their loading port direct to a place of rendezvous to join convoy, on condition that in case of capture, of ships so sailing a deduction of 15l. per cent. be made from the sum insured, or the loss sustained. On the 26th of March, 1813, the Pomona sailed from the river Thames, bound to Malta. It was the intention of the captain to have run direct without convoy to Portsmouth, and there to have joined convoy, that being the place of rendezvous for Mediterranean convoys; but when he reached the Downs, the wind was adverse, and he was obliged to come to an anchor. Soon after, three of his men were pressed, and he went on shore to try to get them released. While so employed, the wind came round, and a King's lugger, called the Speculator, lying in the Downs for the purpose of conveying the trade round to Portsmouth, made a signal for sailing. The captain of the Pomona immediately went on board and sailed after the Speculator, which was a little way a-head of him. He received no sailing instructions, and did not apply for them. He soon lost sight of the convoy in a fog, and was captured near Beachey Head by a French privateer.

Lord Ellenborough. "I think the ship was not bound to sail under convoy of the Speculator. Sailing with convoy has always been understood to mean sailing with the convoy that is appointed for the voyage insured; and we have no proof of any new usage to authorize us to adopt a different construction. The Speculator here never was considered as the convoy with which the Pomona was to sail; to join that she was proceeding to Portsmouth, the general place of rendezvous. Had the weather permitted, she might have proceeded thither direct, without bringing up in the Downs at all. The question, therefore, seems to me to be, whether she did sail direct to Portsmouth, that is to say, with all reasonable expedition, according to the course of navigation, or whether she was not unnecessarily delayed by the captain's going on shore in quest of his men." As to this point, his lordship said: "If the men were necessary for the safe navigation of the ship, the delay was *ex justa causa*; but otherwise, if the ship might have sailed sooner on the change of wind had the captain been on board, the underwriters were discharged."

10. TAYLOR v. WOODNESS. H. T. 1660. K. B. 2 Park, Ins. 454; S. C. 1 Marsh, Ins. 280.

In an action on a policy of insurance tried before Lord Mansfield the plaintiff obtained a warrant to sail with convoy is complied with if the master do all in his power to obtain sailing instructions, but is prevented from obtaining them by the badness of the weather, or if they are refused by the commander of the convoy; see *Veeton v. Wilmet*, Abb. Ship. 243.

in time is a breach of the warranty to sail with convoy. A tiff was nonsuited, there being a warranty to depart with convoy, and it appearing from the evidence, that the commodore of the convoy had made signals for sailing from Spithead to St. Helen's the night before, and had made repeated signals, the next morning, from seven o'clock till twelve, notwithstanding which the ship insured had neglected to sail with him, and did not sail till two hours after, in consequence of which she was taken by a privateer.

11. *WEBB v. THOMPSON*. E. T. 1797. C. P. 1 B. & P. 5.

Sailing orders are necessary to the performance of a warranty to depart with convoy, unless particular circumstances exempt the insured from the general rule. It was proved that the captain, and a passenger on board, who was supposed to have seen the sailing orders, were drowned at the time of the ship being wrecked. The second mate being examined as to his knowledge respecting sailing orders, stated that the captain left the ship for the purpose of obtaining them from the admiral; and that afterwards, on a signal for sailing, the captain asked in what manner it should be answered, gave the necessary directions; but the testimony of the mate being shaken by Admiral Christian's evidence, a verdict was found for the defendant.

Buller, J. (absente Eyre, C.J.) Had not my Lord Eyre, C.J. mentioned that the verdict was entirely to his satisfaction, I should not decide upon this application in the first instance. The case is here brought to a question of law. In point of law, then, the general proposition is, that sailing instructions are necessary. I have never decided this point myself, but it has often been determined. I do not say that there may not be cases in which they may be dispensed with. In *Hibbert v. Pigou* my expression is, "It is not necessary to say whether sailing orders are essential or not; as at present advised, I do not say that they are absolutely necessary; and the case of *Victorin v. Clieve* goes no further. If the captain, from any misfortune, from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy; but then he must part the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with; the captain cannot answer signals; he does not know the place of rendezvous in case of a storm; he does not in effect put himself under the protection of the convoy; and, therefore, the underwriters are not benefitted. The other judges concurred.

[331] 12. *ANDERSON v. PITCHER*. E. T. 1808. C. P. 2 B. & P. 164; S. C. 3 Esp. 124.

A warranty to depart with convoy, is not complied with, unless sailing instructions be obtained before the ship leaves the place of rendezvous. Per Eldon, C. J. The value of a convoy appointed by government in a great measure arises from its taking the ships under control as well as under protection; but that control does not commence until sailing instructions have been obtained, nor can it be enforced otherwise than by their means; indeed the reason of that rule, which requires that the convoy should be appointed by government, shows the necessity of having sailing instructions, since without them the ship does not stand in that relation, or under those circumstances, in which she can take the full benefit of the government convoy.

13. *PARK v. HAMMOND*. H. T. 1816. C. P. 2 Marsh. 189; S. C. 4 Campb. 314; S. C. 6 Taunt. 495; S. C. Holt, 80.

Action was brought against the defendant, for negligence in effecting a policy of insurance on the following instructions, contained in a letter from the plaintiff, dated Malaga, November 20, 1814:—"I request you will insure 1,000*l.* on goods shipped on board the Pearl, E. Callow, master, from Gibraltar to Dublin, with or without convoy. I have every reason to expect we shall sail without convoy, having only a few tons of wine for ballast, and the remainder green fruit. I take the risk myself from this to Gibraltar Bay, where I shall send a letter on shore. I hope you will take care there is a return for convoy, or safe arrival." The policy was effected on the 17th of December, 1814, in the usual form, on goods at and from Gibraltar to London, with liberty to seek, join, and exchange convoys, at a premium of six guineas per cent., to return 2*l.* per cent. for convoy and arrival. The cause was tried before Lord C. J. Gibbs, it appeared that the ship sailed from Malaga on the 2nd of December, and arrived in Gibraltar Bay on the 9th; but did

not touch at Gibraltar, or come to an anchor; that the captain sent the letters on shore by an Algesiras boat; that the ship sailed from the Bay without convoy, and was lost on her voyage to Dublin. His lordship being of opinion that the legal effect of the policy was, that it should attach on goods laden at Gibraltar only, whereas, according to the instructions, it ought to have been stated that the goods were laden at Malaga, the jury found a verdict for the plaintiff.

Per Cur. The only question on which the rule was granted was, whether the plaintiff's letter amounted to orders to insure at Gibraltar or Gibraltar Bay? By the latter part of the letter it was clear that the ship was to proceed laden from Malaga, and that from thence to Gibraltar Bay the plaintiff would take the risk on himself; the defendant, therefore, was bound to have effected the insurance from Gibraltar Bay only.

14. *MORRICE v. DILLON*. M. T. 1780. K. B. 2 Selw. N. P. 969.

Case on a policy of insurance on the ship *Speedwell*, from London to Lisbon, warranted to depart from England with convoy. The ship sailed from London in December, and arrived at Spithead, the place where the Lisbon convoy was to be met with, whence she sailed on the 25th of December with the convoy; on the 26th of December a storm arose, which separated her from her convoy, and rendered her so leaky that she was obliged to sail for Plymouth, where she arrived on the 28th of December. Having been refitted and made a tight ship as was supposed, she sailed again on the 13th of February following, but without a convoy; a few days after she encountered another violent storm, and on the 19th of February she was totally lost near Ireland. Lee, C. J., held that the sense of the warranty was not to be taken literally; that the meaning was, not only to depart with convoy, but to keep with convoy during the whole voyage, and that this had always been so holden; that absolute necessity alone such as rendered it impossible to keep with convoy, could excuse, as being driven by a tempest to some foreign port or place where convoy could not be had; but that was not the present case, the ship having been driven into an English port. He, therefore, was of opinion that this was not a loss within the policy; and accordingly a verdict was found for the defendant.

15. *HISBERT v. PIGOU*. E. T. 1783. K. B. 2 Park, Ins. 443; S. C. 1 Marsh. Ins. 375.

Action upon a policy of insurance on the ship *Arundel*, Captain Mann, at and from Jamaica to London, warranted to depart with convoy. The insurance was at ten guineas per cent., to return three per cent. if the ship sailed on or before the 1st of August. The facts appearing on the report of Lord Mansfield, who tried the cause, are these: On the 25th of July the *Arundel* sailed from Morant harbour to Kingston, where she met the *Glorieux* man of war, Captain Cadogan, who was likewise on his way to join Admiral Graves at Bluefields. Lord Rodney had appointed Admiral Graves to rendezvous at Bluefields, in order to take the fleet of merchant ships, which were to sail from thence upon the first of August, under his command and to convoy them to Great Britain. Captain Mann, upon their meeting in Kingston harbour, asked for sailing orders from Captain Cadogan, who said he had none, and having himself at that time joined the admiral, but he was sure that Admiral Graves would not sail from Bluefields till the *Glorieux* joined him; however, if he should have sailed, he, Captain Cadogan, would give Captain Mann sailing orders, and take every care of the *Arundel* in his power. They proceeded together, and arrived at Bluefields on the 28th of July, but they found that Admiral Graves had sailed two days before; the *Glorieux* and *Arundel* then sailed from Bluefields, the former firing guns, giving signals, and behaving in every respect like a convoy; upon the 5th of August a signal was made that

* But where a ship sailed with a frigate to the rendezvous, with directions in such a case to proceed on the voyage, she lost the voyage, and instead of proceeding on the voyage bore away from the port of destination, held that this was a sailing with convoy sufficient to satisfy a warranty; 1 Marsh, Ins. 398.

[333] the fleet was in sight, and on the 7th they joined the fleet off Cape Anthonio. The Arundel was afterwards lost, in September, in a dreadful storm, which dispersed the whole fleet, and in which a vast number of the ships perished. Upon this evidence the jury were of opinion, under the direction of the Chief Justice, that the terms of the warranty had not been performed, and they, therefore, found a verdict for the underwriters, the defendants. After this question had been fully argued at the bar, the three judges, Mr. Justice Ashurst being at that time one of the lords commissioners of the great seal, delivered their opinions severally.

Lord Mansfield. Though the underwriters and the insured are equally innocent, yet I cannot help saying that now, as well as at the trial, my inclination led me to wish that the plaintiffs were in the right; but the more it is argued it is the less liable to dispute. There are hypothetical contracts and conditional contracts: in the former, the contract depends upon an event taking place; there is no latitude, no equity; the only question is, has the event happened? But the conditional contracts admit of a mere liberal construction. Now, the only question upon this contract is, whether this ship had departed with convoy? A great deal must be referred to the usage of merchants. The government appoints a convoy for the trade, and also names a place of rendezvous; then comes the reference to the usage of merchants; the voyage is begun at Kingston, but the risk only commences at Bluefields. Now, though Lord Rodney desired the captain of the *Glorieux* to take any ships he might pick up in way, and convoy them to Bluefields, yet the warranty in the policy, by the usage, does not require convoy to Bluefields. The second reference to the usage of merchants is, what is esteemed a convoy by merchants? A convoy is a naval force under the command of that person whom government has appointed; they trust to the knowledge of government, which must be supposed to be better acquainted with the plans and force of the enemy, and with the strength necessary to repel their attempts. Now this is the general usage to which matters of this kind are referred. Then let us see what the case is here: Lord Rodney appoints Admiral Graves to go with ten sail of the line to Bluefields, and from thence to convoy the Jamaica trade to Great Britain; when they come to the place of rendezvous they take sailing orders from the admiral, which are essential to convoy, as by them they know the signals for what places they are to steer in case of dispersion by storm or any other just cause. Admiral Graves, on the 26th of July, for reasons best known to himself, thinks he has got all the ships for which he ought to stay, and proceeds on his voyage; he leaves no order for the *Glorieux* to follow him to Cape Anthonio; and though it is very true that it is in the power of the commander-in-chief to change the place of rendezvous, yet in this case it is not true, as was supposed in argument, that Cape Anthonio was appointed at the time of sailing from Bluefields; the *Glorieux* was no part of the convoy, for she did not come there till two days after the fleet was gone. Upon these facts it did appear to me and the jury at the trial that the warranty was not complied with; I continue of the same opinion now, and that this rule should be discharged. The other judges were of the same opinion.

16. ANON. E. T. 1784. K. B. 2 Park, Ins. 502.

Otherwise, if such ship, though so appointed from the fleet, had in truth formed a part of it.*

A bill of lading signed by the

[334] Another action was brought upon the same policy against another of the underwriters; and although a verdict in that case was found for the plaintiff, upon the second trial it was proved, beyond all doubt, that the *Glorieux* was in truth a part of the convoy, a fact which was left doubtful on the first; and it was upon that fact that Lord Mansfield and Mr. Justice Buller chiefly relied.

17. SANDERSON v. BARBER. T. T. 1814. N. P. 4 Campb. 54.

Action against the defendant as owner of a ship called the *Jane*, for breach of a promise to sail with convoy on a voyage from Oporto to London, whereby the plaintiffs who had insured 100 pipes of wine on board her for that voyage,

* Ships sailing from foreign ports are not within the convoy act, unless there are persons at those ports to grant convoy; see *D'Aguiar v. Tabin*, Holt, 185.

had lost a return of premium to which they would otherwise have been entitled, captain. The Jane being at Oporto as a general ship, the plaintiff's agents shipped on ^{steamer ship} board of her 100 pipes of wine, for which the master signed a bill of lading ^{to be bound} in the following form, dated 29th October, 1812: "Shipped, &c. in and upon the ^{to the part} good ship called the Jane, whereof is master, &c., and now riding at anchor in ^{of destination} the river Douro, and by God's grace, bound for London with convoy, to say ^{can with} 100 pipes, &c. and are to be delivered, &c. all and every the dangers, &c. ^{amounted to} order or to assign, &c." Gibbs, C. J., clearly held that this bill of lading, ^{an under} signed by the captain, amounted to an absolute undertaking, by which the ^{task of} defendant as owner was bound that the ship should sail with convoy. His ^{loading on} lordship mentioned that in *Penguist v. Dilchell*, 3 Esp. 54; *Abbot on Shipping*, 123; ^{that the} there was not as had been supposed an express warranty that the ship ^{ship shall} should sail with convoy, and that Lord Kenyon nevertheless held the owners ^{sail with} liable, although there was no evidence of their having authorised or assented ^{convoy.} to the insertion of this clause. It was contended, under these circumstances, the defendant was not liable, as the ship had been prevented from joining ^{convoy} convoy by the accidents of navigation, which must be taken to be an exception to the whole of his undertaking.

Gibbs, C. J. I think you are bound to show that the ship sailed with ^{convoy} convoy, so as to entitle the plaintiffs to their return of premium. That, and nothing short of that, will be a defence. If the circumstances were such, that the ship in point of law, must be taken to have sailed with ^{convoy} convoy, although she was rateable to obtain sailing instructions, 2 Stra. 1250, the action cannot be maintained; but if she is allowed to sail without convoy, the claim and the current are no excuse; 6 T. R. 750. It was admitted that she could not be said to have sailed with convoy, and the plaintiffs had a verdict.

18. LAING V. GLOVER. T. T. 1813. C. P. 5 Taunt. 49.

A vessel which sails with convoy, and is driven back by weather into her ^{A vessel which sails with con} port of clearance, whether she may lawfully sail thence again with her cargo ^{voy, and} of the voyage without waiting for the next convoy from the same port, or join- ^{is driven} ing convoy from any other port, was the question.

Per Cur. We do not know how to put this better than by comparing it to ^{back by} the common case of warranty to sail with convoy. It is admitted by the de- ^{weather is} fendant that the ship it excused, as in a case of necessity, if she is driven into ^{to her port} a port whence no convoy is appointed, and sails from thence without it; but ³³⁵ there is no excuse in the act of her going without convoy from such a port in- ^{of clear} to which she is driven because there is no convoy from thence. There is not ^{ance, may} in the act a hint of any thing to be done, except on the original sailing; it ^{lawfully} could not however escape the legislature, that a ship sailing with convoy must ^{and there} be liable to be driven back and meet with accidents, and that there ought to ^{again with} be some provision for her coming out again, if they meant to legislate for that ^{her cargo} case. We think, therefore, it must be interpreted as in a warranty, and that ^{on the voy} if she have once sailed with convoy on the voyage, she has complied with the ^{age, with} requisition of the act; and if for some necessary cause she is ^{out waiting} ^{for the} ^{next con} ^{voy from} ^{any other} ^{port.} afterwards to leave her convoy, this is not deserting, but is a case not prohib- ^{ited by the act.}

19. LETHULIER'S CASE. M. T. 1719. K. B. 2 Salk. 413.

In an action on a policy of insurance by the defendant at London, insuring ^{The war} a ship from thence to the East Indies; warranted to depart with convoy, the ^{rancy is not} declaration showed that the ship went from London to the Downs, and from ^{fulfilled if the} thence with convoy, and was lost. After a frivolous plea and demurrer, the ^{ship join} case stood upon the declaration; and it was objected that here was a departure ^{the annual} without convoy. But by the Court: The clause "warranted to depart with ^{place of} convoy" must be construed according to the usage of merchants, that is, from ^{rendezvous.} such place where convoys are to be had, as the Downs.*

See 2 Stra. 1251. 1262; 4 Campb. 62; 2 B. & P. 111. 116.

* It is true Lord Chief Justice Holt differed from the rest of the Court, being of opinion that it was no part of the law of merchants to take convoy in the Downs. His lordship's opinion, however, although he is one of the first authorities, is certainly contradicted by practice, it being almost the invariable custom for the convoy to meet the merchant ships only in the Downs.

Hence, a warranty to depart with convoy in a policy from London to Gibraltar has been held to be satisfied by the ship's joining the convoy for the Gibraltar trade at Spithead.

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If the want of sailing in strictness be not at tributable to the default of the master, the warranty is satisfied without ob taining them.

20. GORDON v. MORLEY. H. T. 1077. K. B. Stra. 1265. S. P. CAMPBELL v. BOSDIEU. H. T. 1077. K. B. Id.

On an insurance from London to Gibraltar, warranted to depart with convoy, it appeared there was a convoy appointed for that trade at Spithead, and the ship *Ranger* having need for convoy in the Downs, proceeded for Spithead, and was taken in her way thither. The insurers insisted, that this being the time of a French war, the ship should not have ventured through the Channel, but should have waited in the Downs for an occasional convoy, and many merchants and office keepers were examined to that purpose. But the Chief Justice held that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words "warranted to depart with convoy;" Salk. 443. 445. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the Downs.

See Cowp. 601. 602; 3 B. & P. 114.

21. VICTORIN v. CLEEVE. H. T. 1077. K. B. 2 Stra. 1250.

The plaintiff insured goods in the *John and Jane*, from Gottenburgh to London, with a warranty to depart with convoy from Heckery. In July, 1744, the ship sailed from Gottenburgh to Heckery, and there she waited for convoy two months. On the 21st of September, at nine in the morning, three men of war, who had one hundred merchant ships in convoy, stood off Heckery, and made a signal for the ships there to come out, and likewise sent in a yaul to order them out. There were fourteen ships waiting, and the *John and Jane* got out by twelve o'clock, and one of the first, the convoy having sailed gently on, and being two leagues a-head. It was a hard gale, and by six in the afternoon the ship came up with the fleet, but could not get to either of the men of war for sailing orders on account of the gale of wind. It was stormy all night, and at day-break the ship in question was in the midst of the fleet; but the weather was so bad that no boat could be sent for sailing orders. A French privateer had sailed amongst them all night, and on the 22nd, it being foggy, attacked the *John and Jane* about two, who kept up a running fight till dark, which was renewed the next morning, when she was taken. For the defendant it was insisted that this ship was never under convoy, nor is ever considered so till they have received sailing orders; and if the weather would not permit the captain to get them, he should have gone back. But the Chief Justice and jury were both of opinion that, as the captain had done every thing in his power, it was a departing with convoy, and these agreements are never confined to the precise words, as, in the case of departing with convoy from London, when the place of rendezvous is Spithead, a loss in going thither is within the policy. So the plaintiff recovered. See B. & P. 169, 170.

22. JEFFERY v. LEGENDRE. M. T. 1667. C. P. 3 Lev. 320; S. C. 1 Show. 320. 4 Mod. 60. S. P. AUDLEY v. DUFF. H. T. 1800. C. P. 2 B. & P. 114.

A ship warranted to sail or depart with convoy is obliged to keep with the convoy, and cannot wilfully separate from it, after the commencement of the voyage.

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without a violation of the warranty.

Assumpsit on a policy of insurance made in the usual form; and in the conclusion of the policy were the words usually there inserted, viz. "warranted to depart with convoy;" and the voyage was to be from London to Naples; and June 17, the ship departed from London with convoy; but the 19th of June, the ship and the convoy were separated by tempest, and the ship was by the tempest driven into Foy, and the convoy into Torbay, ten leagues distant from Foy; and the ship and the convoy continued in the said several ports till March 1, when the wind changed, and so continued till March 3, which was time enough for the convoy to have arrived at the ship; and that the ship sailed out of Foy to go to the convoy; but before she reached the convoy, she was by another tempest drove seventy leagues out to sea, the convoy remaining all this time at Torbay; and the ship being so out at sea was taken by pirates; and, upon a special verdict, finding the whole matter (on the issue *non assumpsit*), the question was, whether the insurer should be charged? And, 1st. It was agreed and admitted on both sides, that by the custom of merchants, those words "warranted to depart with convoy" are the words of the

assured, and not of the assurer; and by them the assured is to find the convoy. 2ndly. It was held, by the Chief Justice Holt, and the most part of the Court, that, although the words are only to depart with convoy, yet they extend to sail with convoy throughout the whole voyage. But 3rdly. That this separation being by the tempest at the first, and the ship and the convoy never after meeting, and the ship sailing to meet with the convoy to go with it the rest of the voyage, and being again driven away by tempest and taken by the pirates, though the convoy remained all this time at Torbay, yet this was not such a neglect in the convoy as to discharge the insurer, who might have stayed at Foy till the convoy came to him. And, therefore, they gave judgment for the plaintiff. See Doug. 72. 74; 2 id. 708.

23. RUNQUIST v. DITCHELL. M. T. 1807. N. P. 3 Esp. 64.

This action was brought against the defendant as the owner of the ship *Cromen*, under the following circumstances: she was put up at the coffee-house as a general ship for Oporto, warranted to sail with convoy; the plaintiff shipped goods on board her, and effected a policy on her on goods on board the *Cromen*, warranted to sail with convoy; she did not sail with convoy, and was lost by reason of not complying with the warranty. The policy became void as against the underwriters, and the present action was brought to recover in damages the value of the goods, which it had been intended should have been covered by the policy. The ship-broker was called: he proved that he had put the ship as a general ship for Oporto, at the usual places at the Royal Exchange; that the captain had during that time been frequently at the Exchange; that he had signed bills of lading, in which the ship was warranted to sail with convoy; and that hand-bills to that effect had been handed about.—The captain was called, but denied having given any authority so to represent the ship.

Lord Kenyon said, that he thought there was a sufficient representation of the ship's sailing with convoy, from the manner in which it was published and announced to the world; it was in the common and usual way. He remembered a case at Hereford, where a gentleman having lost some horses, a hand-bill was put out and generally circulated, offering a reward for the recovery. A person having enabled him to recover the horses, applied for the reward offered by the advertisement, which the gentleman then thought fit to disavow. An action was brought, and it was held that the publicity of the hand-bills and their general circulation must be sufficient to charge the party with being privy to their circulation; and the plaintiff recovered. As to the agent having exceeded his authority, that made no difference in the case; many cases might be put, where a person has authorized another to do acts for him, and who has been bound by his acts, though exceeding his authority; such as merchants who have authorized their clerks to accept bills for them, and many other instances. He was, therefore, of opinion that the defendant was here bound by the acts of his agent, and the plaintiff entitled to recover.

24. SNELL v. MARRYAT. 1807. Abbot, on Ship. 213.

An action brought by a person who had shipped goods on board a general ship for Grenada, against the owner, for having sailed without convoy, in consequence of which he had lost the benefit of an insurance which he had effected, the ship having been captured on the voyage. It appeared at the trial, that the ship had been put up or advertised to sail with convoy, but that the bill of lading made no mention of convoy; that it was in fact intended that the ship should sail with convoy, but that she was blown out of the Downs in a gale of wind, and the master then intended to go into Falmouth to wait for the convoy; but being prevented from doing so by the appearance of a French privateer, by which he was chased, he made sail for Grenada, and was afterwards taken. At the trial the defendant obtained a verdict. The Court was afterwards moved to grant a new trial, and the case was argued at some length.

* A voyage undertaken in contravention of the 4 Geo. 3. c. 67. respecting convoys is illegal, and no action can be maintained upon a contract founded on a violation of its provisions; see *Wilson v. Fordingham*, 1 M. & S. 468.

The insertion of a clause in the advertisement of the ship's sailing by the broker, purporting that it would sail with convoy, renders the owners liable, although there was no evidence of their having authorized or assented to the insertion of such a clause.

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But it has been doubted whether sailing with out convoy, when the ship has been advertised to sail with the convoy, but the bill of lading contains no such stipulation, is binding.*

A new trial was granted, in order that the court might receive further information, and the attention of the counsel was directed to the following points: whether the concise expression "to sail with convoy" meant any thing more than that the ship was intended to sail with convoy, or could be construed as a warranty that the ship should sail with convoy, in the strict sense of the word warranty? what was the effect of the bill of lading, which made no mention of convoy? what was the effect of the endeavours used by the master to sail with convoy, and of the circumstances by which he had been prevented from doing so? The cause was not taken down to a second trial.

25. COHEN V. HINCKLEY. E. T. 1808. C. P. 1 Taunt. 249. S. P. HENDERSON V. HINDE. E. T. 1808. C. P. Id. 250.

But an insurance is not avoided within 43 Geo. 3. c. 57. from the ship having sailed with out convoy, unless the assured was privy thereto.

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It was proved, that the ship having arrived at Portsmouth on the 24th of April, about ten hours after a Quebec convoy had sailed for Falmouth, under orders to lie-to and call for ships off that port, the captain wrote to the plaintiff, who was the owner, to come to Portsmouth. He also expressed his opinion that he might possibly be able to overtake the convoy at Falmouth.—The plaintiff was soon afterwards seen at Portsmouth. The vessel was observed on the 10th day of May, sailing from Portsmouth, in company with many other ships, amongst which was a convoy appointed for the Mediterranean. The Union was never afterwards heard of. The jury, presuming that she sailed with the Mediterranean convoy, found a verdict for the plaintiff, subject to the question, whether the sailing with that convoy was a sufficient compliance with the stat. 43 Geo. 3. c. 57. s. 3?

Per Cur. On the whole purview of the act, it appears that the sailing with convoy which it requires, must be a sailing with convoy for the voyage, or for so long a part of the voyage as a convoy is ever appointed to go. In a letter which the captain wrote to the plaintiff he expressed a very faint hope that he should meet with the convoy at Falmouth. But he does in fact sail from Portsmouth to Falmouth, without a convoy bound for Quebec. It is argued that he may sail from port to port without convoy; but the act does not say that unless he is bound from port to port. The exception in the sixth section is, for vessels bound from port to port. The next argument used is, that the captain may legally endeavour to overtake the convoy; but if he may try at all, why may not he continue to try, till the convoy is arrived within the last ten miles, or even the last mile of the voyage? Such a construction would wholly defeat the purposes of the act. This, then, is a sailing contrary to the act, and avoids the policy.

26. THORNTON V. LANCE. T. T. 1815. N. P. 4 Campb. 231.

Though the Court will presume, in an action on a policy, that the statute has been complied with, until the contrary be shown.

This was an action on the guarantee of a policy of insurance at and from London to Archangel. Several points arose; but only one of them was finally disposed of at Nisi Prius, viz. whether the onus lay upon the assured to show that the ship sailed with convoy? The defendants' counsel contended, that as the stat. 43 Geo. 3. c. 57. expressly requires British ships to sail with convoy, and declares policies of insurance upon them to be void if they do not, it was incumbent upon the assured to show that this condition had been complied with.

Lord Ellenborough. As the law requires that the ship should sail with convoy, I will presume that the law was obeyed till the contrary is shown.—This principle has been settled in Williams v. East India Company, 3 East, 192. and a variety of other cases.

27. LONG V. DUFF. SAME V. BOLTON. T. T. 1800. C. P. 2 B. & P. 209.

The statute does not extend to unregistered vessels.

The Lucy was a Spanish-built ship, purchased at Hamburg by the plaintiff, a British subject; she was not registered, but had paid the alien duties. Previous to setting sail upon the voyage insured, the captain of the Lucy applied to the Admiralty for a license to proceed without convoy to Leghorn and Naples, but only obtained a license for Naples, notwithstanding which he proceeded on the voyage to Leghorn without convoy, and was captured off that place by a French privateer. The only difference between the two cases was that it was represented to the underwriters at the time of effecting the policy that the Lucy was a foreign-built ship and not registered, but in the latter it

was not: in both actions it was objected that as the license obtained did not extend to the voyage insured, the *Lucy*, though a foreign-built ship British owned, was within the provisions of the 38 Geo. 3. c. 76. which makes void all policies upon ships sailing without convoy; and in the second that supposing her not to be within the provisions of the convoy-act, that circumstance ought to have been communicated to the underwriters.

Per Cur. With respect to the general point, the question is, whether a vessel in the situation of the *Lucy*, departing without convoy (not having obtained a proper license so to do), can be deemed to be protected by the policy? or whether that policy is not altogether void under the provisions of the 38 Geo. 3. c. 76. s. 4. which declares that every policy of insurance on any ship or cargo within the purview of the act which shall depart without convoy, or shall wilfully desert its convoy, shall be null and void? The preamble of that act states generally, "that it will add to the security of trade to prevent ships sailing without convoy, except in certain cases;" and the first section enacts, "that it shall not be lawful for any ship or vessel belonging to any of his Majesty's subjects, except as hereinafter provided, to sail or depart from any port or place whatever, unless under the convoy or protection of such ship or ships, vessel or vessels, as shall or may be appointed for that purpose." The principle of policy stated in the preamble to this act will undoubtedly apply to ships foreign-built in the possession of British owners, as well as to ships British built. But whether it was intended to be carried to that extent is the question we are now to decide, and which we must decide by examining the clause which is to carry the principle into effect. The sixth section provides, that nothing in the act contained, by which ships are required not to depart with convoy, shall extend "to any ship or vessel which is not required to be registered by any act or acts of parliament in force on or immediately before the passing of this act." It was contended, on the part of the underwriters, that the words "not required to be registered," might be construed "not entitled to be registered." But it is clear from the context that the legislature intended to use the words "not required" in another sense; for in the line immediately preceding, which describes the prohibitions of the act, the words are "required not to sail without convoy." The true question is, whether this ship was required to be registered by any statute in force when the convoy act passed? It appears that she is foreign built, that she was purchased previous to the time when the prohibition took place; and in order to ascertain whether this ship being British owned, is required to be registered or not, we must look back to the provisions of our navigation laws. If indeed this ship be required to be registered, having departed from a British port without having procured herself to be registered, she is for that offence, by 26 Geo. 3. c. 60. s. 32. *ipso facto* forfeited. We therefore must be thoroughly satisfied that we stand on the most solid grounds before we hold this ship subject to a regulation, by the having infringed which, if she be indeed subject to it, she has incurred the penalty of forfeiture. It appears from Reeves on Law of Shipping, that as British built ships only were entitled to the plantation trade, the certificate of "British plantation registry" was adopted by the desire of the commissioners of the customs to distinguish those ships from foreign built ships British owned, which were entitled to the European trade, and to which the certificate of "foreign ships' registry for the European trade, British property," was given. The twenty-ninth section of that act also takes a distinction between those ships which are required to be registered from that time, viz. British built ships, and those ships which are entitled to be registered in consequence of the previous certificate of registry obtained by them; and then directs that both shall obtain registers. Subsequent to this act therefore all those ships which are entitled to be registered, are required to be registered, and the thirty-second section of the act subjects them to forfeiture in case they attempt to proceed to sea without having been registered. It is material to observe, that this very case shows in what manner the above statute has been understood; for if the ship which was the subject of the present insurance had

been required to be registered, she would not have been permitted to clear out for sea, not having in fact been registered, but would have been seized as forfeited. The last section of 27 Geo. 3. c. 19. which was passed for the express purpose of obviating doubts on the 26 Geo. 3. shows the intention of the legislature that the latter act should have that construction which has now been put upon it. It declares that all ships not entitled by the 26. Geo. 3. to the privileges of British built or British owned ships, and all ships not registered according to the said act, shall, although owned by British subjects, be deemed alien ships, and be liable to the same penalties and forfeitures as alien ships. It is not said that ships not registered shall not be navigated or owned by British subjects; a British owner of a foreign built ship may engage in neutral trade, and will be liable to the alien duties; but it was not the policy of the legislature to prevent British subjects from employing foreign ships in neutral trade in as ample a manner as they can be employed by aliens. The 34 Geo. 3. c. 68. contains several provisions for granting now certificates upon a transfer of property; but it appears to us to proceed upon the same ground as the 26 Geo. 3. and to regulate those cases only in which a title to a certificate having been given, a certificate is required to be obtained, and in which the parties obtaining it are to derive some advantage from it. In this view of the subject we are all of opinion that the objection taken cannot be supported; and therefore that the verdicts must stand.

(Q) RELATIVE TO REPRESENTATIONS.

1. PARSONS v. WATSON. E. T. 1778. K. B. Cowp. 785.

An insurance effect ed under a misrepresentation is void, whether it arose from fraud or negligence:

It appeared in evidence that the first underwriter had the following instructions shown him: "3,500*l.* upon the ship Julius Cæsar, for Halifax, to touch at Plymouth and any port in America; she mounts twelve guns and twenty men." These instructions were not asked for or communicated to the defendant; but the ship was only represented generally to him as a ship of force; and 1,000*l.* had been insured before the defendant underwrote. The instructions were dated the 28th of June, 1776, and the ship sailed on the 23rd of July, 1776, and was taken by an American privateer. That at the time of her being taken, she had on board six four-pounders, ten three-pounders, three one-pounders, and six half-pounders, which are called swivels, and twenty-seven men and boys in all, for her crew; but of them sixteen only were men, not twenty, as the instructions mentioned, and the rest boys. But the witness said he considered her as being stronger with this force than if she had twelve carriage guns and twenty men. He also said, which is a material circumstance, that there were neither men nor guns on board at the time of insurance; that he himself insured at the same premium, without regard or inquiry into the force of the ship. Other underwriters also insured at the same premium, without any other representation than that she was a ship of force.

[342] That to every four-pounder there should be five men and a boy; that in merchant ships, boys always go under the denomination of men. This was met by evidence on the part of the defendant, saying, that guns mean carriage guns, not swivels, and men mean able men exclusive of boys. There were three causes of the same nature depending upon the same evidence. The defence in each was, that these instructions were to be considered as a warranty, the same as if they had been inserted in the policy, though they were not proved to have been shown to any but the first underwriter in all the three cases. The question reserved for the opinion of the Court is, whether the written instructions which were shown to the first underwriter are to be considered as a warranty inserted in the policy, or as a representation which would only avoid the policy, if fraudulent? If the Court should be of opinion that the instructions amounted to a warranty, then a new trial is to be granted in each, without costs, otherwise the verdicts are to stand.

Lord Mansfield asked, whether there was any case that made a difference between a written and a parol representation? Upon receiving no answer, his lordship proceeded to give his opinion as follows: "There is no distinction better known to those who are at all conversant in the law of insurance than that

which exists between a warranty or condition, which makes part of a written policy, and a representation of the state of the case; where it is a part of the written policy it must be performed; as if there be a warranty of convoy, there it must be a convoy; nothing tantamount will do or answer the purpose; it must be strictly performed, as being part of the agreement, for there it might be said the party would not have insured without convoy. But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore, if there is fraud in a representation, it will avoid the policy as a fraud, but not as a part of the agreement. If in a life policy a man warrants another to be in good health, when he knows at the same time he is ill of a fever, that will not avoid the policy, because by the warranty he takes the risk upon himself; but if there is no warranty, and he says the man is in good health, when in fact he knows him to be ill, it is false; so it is if he does not know whether he is well or ill; for it is equally false to undertake to say that which he knows nothing at all of, as to say that is true which he knows is not true. But if he only says he believes the man to be in good health, knowing nothing about it, nor having any reason to believe the contrary, there, though the person is not in good health, it will not avoid the policy, because the underwriter then takes the risk upon himself; that there cannot be a clearer distinction than that which exists between a warranty which makes part of the written policy and collateral representation, which if false in a point of materiality makes the policy void, but if not material it can hardly ever be fraudulent. So far from the usage being to consider instructions a part of the policy, parol instructions were never entered in a book, or written instructions kept, till many years ago, upon the occasion of several actions brought by the insured upon policies where the brokers had represented many things they ought not to have represented, in consequence of which the plaintiffs were cast. I advised the insured to bring an action against the brokers, which they did, and recovered in several instances; and I have repeatedly at Guildhall cautioned and recommended it to the brokers to enter all representations made by them in a book; that advice has been followed in London; but it appeared lately at the trial of a cause, that at Bristol to this hour they make no entry in their books or keep any instructions. The question then is, whether in this policy the party insuring has warranted that the ship should positively and literally have twelve carriage guns and twenty men; that is, whether the instructions given in evidence are a part of the policy? Now, I will take it by degrees. The two first underwriters before the Court are Watson and Snell. Says Watson, it is part of my agreement that the ship shall sail with twelve guns and twenty men; and it is so stipulated that nothing under that number will do; ten guns with swivels will not do. The answer to this is, read your agreement, read your policy; there is no such thing to be found there. It is replied, yes; but in fact there is; for the instructions upon which the policy was made contain that express stipulation. The answer to that is, there never were any instructions shown to Watson, nor were any asked for by him; what colour then has he to say that those instructions are any part of his agreement? It is said he insured upon the credit of the first underwriter. A representation to the first underwriter has nothing to do with that which is the agreement or the terms of the policy. No man who underwrites a policy subscribes by the act of underwriting to terms which he knows nothing of; but he reads the agreement and is governed by that. Matters of intelligence, such as that a ship is or is not missing, are things in which a man is guided by the name of a first underwriter who is a good man, and which another will therefore give faith and credit to, but not to a collateral agreement, which he can know nothing of. The absurdity is too glaring; it cannot be. By extension of an equitable relief in cases of fraud, if a man is a knave with respect to the first underwriter, and makes a false representation to him in a point that is material, as where, having notice of a ship being lost, he says she was safe, that shall affect the policy with regard to all the subsequent underwriters, who are presumed to follow the first. How then do Watson and

Snell, who underwrite the ship in question, without knowing whether she had any force at all? That proves the risk was equal to a ship of no force at all, and the premium was a vast one—eight guineas. So much, therefore, for those two cases. The third case is that of Ewer, who saw the instructions with the representation which they contained. Did the number of guns induce him to underwrite the policy? If it did, he would have said, “put them into the policy warrant that the ship shall depart with twelve guns and twenty men;” whereas he does do no such thing; but takes the same premium as Watson and Snell did, who had no notice of her having any force. What does that prove? That he is paid and receives a premium as if it were a ship of no force at all. The representation amounts to no more than this: I tell you what the force will be; because it is a representation only of what in the then state of the ship they thought would be the truth; the ship sailed with a larger force, for she had nine carriage guns besides six swivels. The underwriters, therefore, had the advantage by the difference. There was no stipulation about what the weight of metal should be; all the witnesses say she had more [344] force than if she had had twelve carriage guns, both in point of strength, of convenience, and for the purpose of resistance. The supercargo in particular says, he insured the same ship and the same voyage for the same premium, without saying a syllable about the force. Why, then, it was a matter proper for the jury to say whether the representation was false or whether it was in fact an insurance as of a ship without force? They have determined, and I think very rightly, that it was an insurance without force. One of the parties has made an objection, that the representation ought to be considered as inserted in the policy; but the answer to that is, that as he has determined whether it should be inserted in the policy or not, by not inserting it himself, there is a great difference whether it shall be considered as a fraud. But it would be very dangerous to permit all collateral representations to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid what Mr. Thornton has paid, who was the first person that saw the instruction. Shall the rest refuse, then? As to Watson and Snell, they have no pretence to refuse; for there is not a colour for the objection made by them or Ewer. We are all satisfied with the determination of the jury. Against him, therefore, the rule for a new trial must be discharged.

2. NOBLE V. KENNAWAY. M. T. 1780. K. B. 2 Doug. 510.

But the underwriters are bound to know the nature and peculiar circumstances of the branches of trade to which the policy relates.

The insurance was upon the ships the *Hope* and the *Anne*, at and from Dartmouth to Waterford, and from thence to the port or ports of discharge on the coast of Labrador, with leave to touch at Newfoundland, and upon any kind of goods and merchandises; and also on the ships till they should be arrived at their port of discharge, and should have moored at anchor twenty-four hours, and on the goods and merchandises, until the same should be there discharged, and safely landed. By a clause in the policy, money advanced to the fishermen was insured. The *Anne* arrived safe on the coast of Labrador on the 22nd June, and the *Hope* on the 14th of July, 1788. From the time of their arrival, the crews were employed in fishing, and had taken out none of their cargoes, except, at leisure hours (partly on Sundays), such things as were immediately wanted. On the 10th of August, an American privateer entered the harbour (Temple Bay) and took both the vessels, there being nobody at that time on board either of them. The action was brought to recover the value of the goods. The defence was, that there had been an unnecessary delay in unloading the cargo, in consequence of which they had been exposed to capture, and that the underwriters ought not to be liable for what had happened from the negligence of the insured. The plaintiffs rested their case on words of the policy, and on the usage of the trade. They called on Astwick, the captain of the *Anne*, who said that he had been the same voyage three times in the three last years, and that he had proceeded in the same manner during each of the voyages; that he did not think the plain-

liffs had warehouses sufficient to have held the goods if they had been landed; and that there were no settlements on the coast of Labrador but those belonging to the plaintiffs. One of the sailors swore to the same effect. The plaintiffs then called one French, to prove the custom of the Newfoundland trade. This evidence was objected to; but Lord Mansfield admitted it, and the witness swore that in the Newfoundland trade it is customary to keep their goods on board several months, and that sometimes they have part of their homeward cargo of fish and part of their old cargo on board at the same time; that the first object is to catch fish, and they unload only at times when they cannot fish. The old cargo, chiefly salt and provisions, is taken out gradually for curing the fish and for consumption. This witness was confirmed by one Newman; neither Newman nor French had been at Labrador. One Hunter was then called, who proved that some years since, he used to send vessels of his own, and also chartered vessels, to Labrador, and that it was usual in chartering vessels to stipulate that they should have sixty days allowed for discharging; that he apprehended they were oftentimes longer, in fact; and that it was not so easy to discharge a cargo at Labrador as at Newfoundland.

Per Cur. The trade of fishing on the coast of Newfoundland, especially from the west of England, has been known and practiced for many years. Since the treaty of Paris a new trade has been opened to Labrador. The insurance here is on the ships and the goods till landed. The defendants say the plaintiffs have been guilty of an unreasonable delay in landing. That assertion was to be tried by the jury, and could only be decided by knowing the usual practice of the trade. Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is established or not; if he does not know it he ought to inform himself. It is no matter if the usage has only been for a year. This trade has existed, and has been conducted in the same manner for three years. It is well known that the fishery is the object of the voyage, and the same sort of fishing is carried on in the same way at Newfoundland. We still think the evidence on that subject was properly admitted to show the nature of the trade. The point is not analogous to a question concerning a common law custom.

3. *BARBER V. FLETCHER.* M. T. 1779. K. B. 1 Doug. 505. S. P. POWSON
WATSON. E. T. 1778. K. B. Cowp. 786.

This was an action on the same policy with *Barber v. French*, which has been before abridged, tried at the same time, the same rule entered, and a similar verdict found; but here, besides the ground mentioned in the case, there was another stated, viz. that since the trial a material representation, which had been made to Shulbred, the first underwriter on the policy, and which turned out to be false, and had been discovered. After the other case was disposed of, this stood over on this point till an affidavit of the fact should be procured from Shulbred.

Lord Mansfield. It has certainly been determined, in a variety of cases, that a representation of the first underwriter extends to the others. But under what circumstances has the defendant gone to trial in this case? He certainly knew what had been represented to himself; he was acquainted with Shulbred, and had an opportunity of asking before the trial what had been represented to him. If, therefore, this evidence is new, it is owing to his own negligence. But the representation is not material; it was only an expectation, and the underwriters did not inquire into the ground of the expectation. This was lying by till after a trial, in order to make an objection if the verdict should be for the plaintiff.

4. *MANDER V. REED.* E. T. 1803. K. B. 8 East, 572.

A slip of paper, wherein the names of the underwriters were mentioned in the order in which they had originally been applied to and had agreed to underwrite (and which was different from that in which their names had appeared in the policy), having been tendered in evidence to show the true order of the names, for the purpose of letting in evidence of a false representation made to the first underwriter in fact; the court were of opinion that such paper could

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Representa-
tion made
to the first
underwri-
ter extends
to all the
others.

The policy
itself is the
regular evi-
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show who
was the
first under-
writer, and
an unstamp-
ed slip is
not admissi-
ble to prove
that a par-
ty whose
name does

not appear first on the policy was in truth the first who agreed to the contract. Representations made by the broker to the first underwriter, but to the first alone, are available for others.

not be received in evidence for want of a stamp, the effect of the evidence being to show, through the medium of a writing, that the contract entered into between the parties was different from that which it appeared to be on the face of the policy.

5. *BRINE v. FEATHERSTONE* E. T. 1813. C. P. 4 Taunt. 869.

Action upon a policy of insurance. One part of the defence attempted to be established was, that Evitt, the broker employed to effect the policy for the defendants, had, on the 28th of June, when Marshall, who underwrote for the defendant, and who was not the first underwriter, put his name on the slip, represented to him that the *Mary Ann* was then either near Messina or at Messina, or on her homeward voyage. Macullum, an underwriter, who had signed the ship after Marshall, had, before subscribing the policy, learned that the *Mary Ann* had then sailed only two days from Falmouth, and had communicated this fact to Evitt, before Marshall had executed the policy, and thereupon withdrawn his own name and refused to subscribe the policy. Evitt did not however communicate this fact to Marshall, but suffered him to subscribe the policy. The defendants also called other subscribers to the policy, neither of whom was the first underwriter, to prove what representations had been made to them. Evitt had, on the 8th of June, effected a policy on the ship's outward voyage, which Marshall himself underwrote for the defendant. The Gravesend printed list, which was kept for public inspection at Lloyd's, showed that the *Mary Ann* sailed on the 15th of June from London; she sailed from Falmouth on the 30th of June; she did not go direct to Messina but to Malta for a cargo. She stopped at Gibraltar for a considerable time; and while she lay at Malta, being unable to obtain a freight, she was coppered with copper which she had taken out with her; she afterwards obtained a lading there, and carried it to Messina, and there took in a cargo for the homeward voyage on which she sailed on the 1st of November, and in the course thereof was captured. The plaintiffs on the 8th of November effecting another policy, paid fourteen guineas per cent. premium. The testimony of Evitt not agreeing with that of the plaintiff's witnesses as to the representations he had made, it was put to the jury that the witnesses, either on the one side or the other, must be perjured. Gibbs, J., thought that there had been no misrepresentation of any fact nor any fraud, and to avoid the policy there must be fraud; that the testimony of both sets of witnesses was reconcileable, upon the supposition that the broker had only stated his opinion and the inference respecting the state of the vessel, which he drew from circumstances; and that a mistake in that opinion would not, unless it were given with a fraudulent intent, avoid the policy. If the underwriters had intended to rely on his opinion and computation, they should have inquired the grounds of it, and then they might have chosen whether they would adopt it or not. A representation of a fact made by the broker, if false, would avoid the policy. The suppression of a material fact was a fraud, but there was a wide distinction between stating a fact and an opinion. What the broker stated was only an inference which he drew from facts; if the underwriter did not inquire what the facts were on which the broker founded his conclusion, the fallacy of the conclusion did not avoid the policy. If there were any facts existing by which it was rendered impossible to draw such a conclusion as the broker expressed, it would be a badge that the conclusion was fraudulent; but in this case there was no evidence of his being acquainted with any such thing; the broker here stated morely his opinion that the ship was arriving or had arrived; if here he had stated his computation as a fact, as in *Macdowall v. Frazer*, 1 Doug. 260. he would be bound by it; he could not here mean to state it as a fact, for he states she was in one of three situations; although his opinion was false, yet if it were not misrepresented by fraud it would not avoid the policy. He was strongly disposed to think that an underwriter should not lightly attribute fraud to a broker. The learned judge received the evidence of representations made to underwriters subsequent to the first hesitation, on the question of its admissibility. The jury found a verdict for the plaintiff.

Per Cur. It would be extremely mischievous in the multiplicity of business which an insurance broker has to transact, if he were bound to remember and disclose the circumstances of every former relevant transaction in which he has been engaged. There is a case in 2 Eq. Ca. Abr. 682. D. margin, where Mr. Pigott, the conveyancer, had a title laid before him, with notice of a certain incumbrance, and presently another abstract was laid before him without notice of it, and an attempt was made to apply to the second principal the notice made to the conveyancer. No, says the Court; he cannot be expected to carry in his head all the incumbrances on all the abstracts he reads; the same thing applies to the multiplicity of policies which these persons affect.

6. EDWARDS V. FOOTNER. M. T. 1803. N. P. 1 Campb. 530.

Action on a policy of insurance. About a week before the policy was signed, the names of the underwriters were put down upon a slip, when the broker stated to the defendant that the Fanny was to sail with the Hopewell and Young Roscius, both armed ships, and that she was herself to carry ten guns and twenty-five men. There was no evidence of any conversation upon the subject having passed between the parties either when the policy was signed, or in the intervening period. In fact, the Fanny sailed by herself and carried only eight guns and seventeen men.

Lord Ellenborough. When a representation is once made it is to be considered as binding, unless there is evidence of its being afterwards altered or withdrawn. In the case of Dawson v. Atty, 7 East, 367. the vessel was stated to be an American when the slip was made out; but when the policy came to be signed, the broker said generally, "that it was an insurance on goods in the Herman," without describing her as of any particular country. There the first conversation was qualified and controlled by what followed: but here there is no evidence of any conversation upon this subject between the parties subsequently to the statement that the ship was to carry ten guns and twenty-five men; and this having taken place when the insurance was talked of, and the terms of it were agreed upon, it must be referred to the policy, and treated as a representation which required to be satisfactorily complied with on the part of the assured; 8 T. R. 192.—Verdict for the defendant.

7. DAWSON V. ATTY. E. T. 1806. K. B. Cited 7 East, 367.

Goods were insured on board the Herman, without any addition of country or place, and not represented to be of any particular country at the time of subscribing the policy, although the broker, when the ship was subscribed, had said she was an American. The Court held that, though she was in fact an American, she need not under these circumstances be documented as such, to entitle the assured to recover against the underwriters for a loss by capture, and subsequent condemnation, for want of the documents required by treaty between her owner and the capturing state; for she was neither insured as American nor represented to be such at the time when the policy was effected.

8. PEARSON V. WATSON. E. T. 1778. K. B. Cowp. 785. S. P. Weir v.

ABERDEEN. M. T. 1822. K. B. 2 B. & A. 320.

Per Cur. A representation to the first underwriter has nothing to do with that which is the agreement or terms of the policy. No man who underwrites a policy subscribes, by the act of underwriting, to terms of which he knows nothing; but he reads the agreement, and is governed by that. Matters of intelligence, such as that a ship is or is not missing, are things in which a man is guided by the name of a first underwriter, who is a good man, and to which another will therefore give faith and credit, but not to a collateral agreement, of which he can know nothing. The absurdity is too glaring; it cannot be. By extension of an equitable relief in cases of fraud, if a man is a knave with respect to a first underwriter, and makes a false representation to him in a point that is material, it is fatal.

9. FREELAND V. GLOVER. T. T. 1806. K. B. 7 East, 457; S. C. 3 Smith, 424; S. C. 6 Esp. 14.

A ship on an African voyage, the common duration of which is several months, and sometimes extends to a twelvemonth or more, arrived on the coast

A representation made to the underwriters, at the time when their names are put down upon the slip, is binding on the insured, unless qualified or withdrawn by some communication between that time and the execution of the policy; But where a broker, in effecting a policy on goods, said at the time of subscribing the slip that the ship on board of which they were was an American, but nothing was afterwards represented on the subject, the case was considered as standing as any representation. If a representation be substantially performed, it suffices; Or if it contain a true and faithful representation

[349] in August, 1799, and in February, 1800, her then commander wrote a letter to his owners, mentioning an attack on her at another place on the coast by the natives, who killed the captain and several of the crew, and wounded others, by means of which and a fever the crew were reduced to five, and all those sickly, and not a man to be procured at hand; that they had been plundered of their clothes, &c., and their cabin stores were exhausted, and they did not know what to do. A second letter, dated April the 21st, 1800, from Gahoon River, mentioned their arrival there on the 24th March; that the natives finding them weakly handed and their goods taken from them, did as they pleased; that they had then nine men on board, but their provisions ran very low; that he had mentioned certain parts of the cargo in his last letter, and expected to ship the rest and to sail at the end of the next month. An insurance was effected in September, 1800, on the production of the last letter only, at and from the ship's arrival at her first place of trade on the coast of Africa, &c. The Court held it sufficient, that the last letter truly stated the then condition and circumstances of the ship, which though better than when the first letter was written, was yet no fraudulent concealment of the former circumstances, the second letter, both in its terms and contents, referring to a former letter, which it was the fault of the underwriters not to have called for, if they thought that a particular knowledge of former difficulties, in part subdued, and to the extent truly stated in the second letter, would have varied the risk; and when the underwriters (cognizant as they must be presumed to be, of the common duration of such a voyage) could not fairly collect, from the contents of the second letter, that the first arrival of the ship on the coast was only on the 24th of March, when she was stated to have arrived in Gahoon River, and to have had much of her homeward bound cargo on board on the 21st of April, and was expected to sail with the remainder by the end of May. Sec 2 B. & A. 320.

And when occupied with a refusal to warrant, shows an intention to exclude it from the contract.

On a representation that a ship was seen safe on a named day, at a certain latitude or point of the voyage,

[350] if it turn out that she had got safe to the point represented, but was lost two days before the day mentioned, the difference, though by mistake, is material.

10. NONNER V. REED. T. T. 1812. K. B. 16 East, 176.

The Court held, that the plaintiff was entitled to recover a loss of goods insured at and from Landscrona to Wolgost, though they were at Gottenburgh before the ship arrived at Landscrona, and though the policy was declared to be at and from the loading of the goods on board the ship, it appearing that the underwriter was informed at the time that the goods were loaded on board at Gottenburgh, and that part of them were landed and re-loaded at Landscrona, so as to enable the Custom House officers there to ascertain the quality of the whole, and to adjust the duties, and the policy being free of average. A mere representation that the cargo was Swedish and neutral, which was true in fact, though contradicted by the French sentence of condemnation, was no objection to the plaintiff's recovery, nor the want of documents as Swedish property, required only by French ordinance. The exclusion of the British flag from Swedish ports not appearing to be by French control, and Sweden not being a co-belligent with France, was held not to be within the prohibition of the order in council of the 7th of January, 1807.

11. MACDOWALL V. FRASER. M. T. 1779. K. B. Doug. 260.

This was an action upon a policy of insurance on the ship the *Mary and Hannah*, from New York to Philadelphia. At the time when the insurance was made, which was in London, on the 20th of January, the broker represented the situation of the ship to the underwriter as follows: "The *Mary and Hannah*, a light vessel, sailed with several armed ships, and was seen safe in the Delaware on the 11th of December, by a ship which arrived at New York." In fact, the vessel was lost on the 9th of December, by running against a *chevaux-de-frize* placed across the river. The defence was founded on the misrepresentation as to the time when the ship was seen, and the representation and the day of the loss being proved, the jury found for the defendant.

Lord Mansfield. The distinction between a warranty and a representation is perfectly well settled. A representation must be fair and true. It should be true as to all that the insured knows; and if he represents facts to the un-

derwriter, without knowing the truth, he takes the risk upon himself; 1 Term. Rep. 12. But the difference between the fact as it turns out, and as represented, must be material. The case of *Julius Cæsar* was very different from this. The ship there was only fitting out when the insurance was made. No guns nor men were put on board. It was only said what was meant to be done, and what was done, though different, was as advantageous or more so than what had been represented. There was no evidence of actual fraud in the present case, and no question of that sort seemed to be made; but there was a positive averment that the ship was seen in the Delaware on the 11th of December. The underwriter was deceived as to that fact, and entered into the contract under that deception. There was no evidence at the trial when she was seen in the Delaware, or in what condition. But suppose the fact had been explained in the manner now suggested, why did the insured take upon him to compute the day of the month on which she had been seen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation? In insurance on ships, it is always considered as a very important circumstance. I am of opinion that the representation concerning the delay was material.

12. *BERGE V. FLETCHER*. M. T. 1779. K. B. Doug. 275.

This was an action on a policy of insurance on the ship *Carantic*, East India Company, "at and from Port L'Orient to the Isles of France and Bourbon, and to all or any ports or places where and whatsoever in the East Indies, China, Persia, or elsewhere, beyond the Cape of Good Hope, from place to place; and during the ship's stay and trade backwards and forwards at all ports and places, and until her safe arrival back at her last port of discharge in France." But at the same time that this policy was subscribed, there was a slip of paper wafered to it and shown to the underwriters, on which was written the following representation: "The ship has had a complete repair, and is now a fine and good vessel with three decks; intends to sail in September or October next (1776); is to go to Madeira, the Isle of France, Pondicherry, China and L'Orient. The ship did not sail till the 6th of December, 1776, and did not reach Pondicherry till the 23rd of July, 1777. She continued there till the 23rd of August following, when, instead of proceeding to China, she sailed for Bengal, where, having passed the winter and undergone considerable repairs, she sailed from thence early in the year 1778 (being the second ship that left the Ganges), returned to Pondicherry, and after taking in a homeward cargo at that place, proceeded in her voyage back to L'Orient, but was taken in October in that year by the *Mentor* privateer. The usual time in which the direct voyage between Pondicherry and Bengal is performed is six or seven days, but the *Carantic* was absent six weeks in going to Bengal and ten months on the way back from thence to Pondicherry. Both going and returning she either touched at or lay off Madras, Masulipatam, Visigapatam, and Yanon; and took in goods at all those places. It was contended in this cause at the trial that the representation accompanying the policy restrained the voyage to the limits therein specified. Some letters were produced from the owners to their correspondents, one of which was to the following effect: "We doubt not but on account of the storm the ship will be forced to go to Bengal to be laid down, which cannot be done at Pondicherry, in which case our captain will have entered, a protest, which we will forward in time to you." In a subsequent letter they say nothing of the storm or leak, but mention a different cause for the ship's going to Bengal. These letters, it was said, raised a presumption that the necessity of going to Bengal was merely a pretence devised after the capture, and when the insured began to apprehend that the words of the policy would not cover a voyage to that place.

Lord Mansfield told the jury, that the first question was, whether the policy was void on account of misrepresentation? Now there is an essential difference between a warranty and a representation. The warranty is a part of the contract; a risk described in the policy is part of the contract; there can be no warranty by any collateral representation. If the ground on which a

representation affects a policy is fraud, the representation must be fraudulent; that is, it must be false, and material in respect to the risk to be run. All risks are governed by the nature of them; and the premium is governed by the risk. Where a representation accompanies an instrument, it says, "I will have this understood as my present intention, but I will have it in my power to vary it." The great question in this cause is, whether the representation was false, and that in a material instance? Fraud is found out by the materiality of the point it is charged in. It is to be considered then whether they had really a view of going to China. A witness has proved that the difference of insurance is one per cent. on going to Bengal, and not to China. If you think that this was a misrepresentation to avoid paying the one per cent. you will find for the defendant; but if you are satisfied that the real intention at the time of the representation was to go to China, the plaintiff will be entitled to your verdict; for the insured may change his intention, go to Bengal, and yet be protected by the policy, which clearly admits of that voyage, and must be understood by both parties in a greater latitude than the representation, being expressed in different and much more comprehensive terms. If upon the whole evidence you shall be of opinion that no fraud was intended, and that the variance between the intended voyage is described in the slip of paper, and the actual voyage as performed did not tend to increase the risk to the underwriters, this slip of paper being a representation, you must find for the plaintiff.

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The jury found a verdict accordingly. And although in several causes upon the same ship new trials were moved for, and granted, yet in this, which was the only cause in which there was a representation, the verdict was acquiesced in, and no motion respecting it ever was made.

13. *BARBER v. FLETCHER*. M. T. 1779. K. B. Doug. 305.

Nor when the party making it really believes what is asserted, and does not make his assertion positively, but only as a matter of expectation or belief.

The facts are detailed, *ante*, p. 345.

Lord Mansfield. It has certainly been determined, in a variety of cases, that a representation of the first underwriter extends to the others. But under what circumstances has the defendant gone to trial in this case? He certainly knew what had been represented to himself; he was acquainted with Shulbred, and had an opportunity of asking before the trial what had been represented to him. If, therefore, this evidence is new, it is owing to his own negligence. But the representation is not material; it was only an expectation, and the underwriters did not inquire into the ground of the expectation. This was lying by till after a trial, in order to make an objection if the verdict should be for the plaintiff. See 4 Taunt. 174; 10 East, 415; 3 Campb. 313.

14. *TAYLOR v. WILSON*. E. T. 1812. K. B. 15 East, 324.

When the insurance is only for part of the voyage, the ultimate destination need not be communicated.

The policy contained the following common clause, in print, with the addition of the words, from St. Ubes to Portsmouth, which were in writing: "Beginning the adventure upon the said goods and merchandizes from the landing thereof aboard the said ship, upon the freight of the said ship, &c. at St. Ubes; and so shall continue and endure during the abode there upon the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever, shall be carried into Portsmouth." In the margin at the foot of the policy were written the words "on freight." The defendant subscribed the policy, and received the premium of eight guineas. The plaintiffs were owners of the ship John, and on the 10th of September, 1808, the plaintiff Taylor, who was the master of the vessel (and who is so stated to be in the policy), on behalf of himself and the other owner Chaters, chartered the vessel; and by the charter-party she was to proceed from Newcastle to Lisbon with coals, and from thence to St. Ubes, in Portugal, and there take in a cargo of salt for Gottenburgh in Sweden. The plaintiff, Taylor, proceeded as the master of the vessel to Lisbon, and there delivered the coals, and arrived at St. Ubes in December, 1810, and there loaded 360 tons of salt, to be carried to Gottenburgh. The freight for each reel of coals to be delivered at Lisbon was 50*l.*, and for each ton of salt, 5*l.*; and the plaintiff Taylor, as master, signed bills of lading for the salt, which

was to be carried to Gottenburgh. The bill of lading was for Gottenburgh. [353]
 Portsmouth is one of the places from whence convoy were appointed to go to Gottenburgh and other ports in Sweden; and it was the intention of Taylor, the master, to proceed from St. Ubes with the vessel to Portsmouth on her way to Gottenburgh. No communication was made to the underwriters that the vessel was to go to Gottenburgh. On the 20th of January, 1809, the vessel, with the salt on board, sailed from St. Ubes for Gottenburgh, and on the 4th of February, and before her arrival at Gottenburgh or Portsmouth, she was lost by the perils of the sea. If the plaintiffs were entitled to recover, the verdict was to be entered for 100*l.*, otherwise the nonsuit was to remain.

Per Cur. The only question is, whether a freight voyage may be insured part of the way. This was a voyage to Gottenburgh by the way of Portsmouth, and the freight was to be earned at Gottenburgh. There might be a greater peril in the first part of the voyage than in the other, which might have induced the plaintiffs to insure the first part. They did not deceive the underwriter when they insured their freight from St. Ubes to Portsmouth; they did not tell him that the freight was to be earned there, but only that it was an insurance of freight in that voyage. There is no doubt that a party may insure his ship and goods during part of a voyage; and we cannot conceive why he may not also insure freight in the same manner. There is no case which intimates the contrary, except that of *Murdock v. Potts*, at *Nisi Prius*, which was never brought before the Court, and is inconsistent with all the other cases; except that opinion, there is nothing to distinguish an insurance on freight in this respect from an insurance on ships or goods for a part of the voyage. There is no foundation for saying that a voyage is not divisible as a subject of insurance.

15. *DAISCOL v. PASMORE*. H. T. 1798. C. P. 1 B. & P. 200.

The owner of a ship (which was about to sail on a voyage from Lisbon to Where, on Madeira to Saffi, on the coast of Africa, in ballast, and thence to Lisbon with the insurance of a cargo) was desirous of having the insurance effected on part of the freight voyage in Saffi to Lisbon. The underwriters objected on account of the distant futuro, a period at which the risk was to commence; however, on a representation is made of the ship's arrival at Madeira, and that she was about to proceed immediately on the ship's previous destination, a her voyage, the insurance was effected. When the ship arrived at Madeira, a subsequent declaration all the crew except two, being alarmed by reports of some Moorish cruisers off Saffi, and of their having captured and ill-treated a Dane and an American, will not discharge the ship, and refused to return to it unless the captain would promise to sail immediately for Lisbon. Under these circumstances, the captain charged the underwriters. Under these circumstances, the captain carried the ship back to Lisbon; but on his arrival there, the charterers insisted on his proceeding directly from thence to Saffi, which he accordingly did, and was captured in his return from Saffi to Lisbon. It was in evidence that the difference of season arising from this delay did not vary the risk. It was held that the deviation was justified by the special circumstances.

16. *SHOOLHED v. NOTT*. H. T. 1782. K. B. 1 Park, Ins. 346. [354]

Action upon a valued policy of insurance upon the ship the Two Sisters, a sea-worthiness is a condition and a cargo of wheat and wines, from Madeira to Charlestown. The ship had sailed from London to Madeira. The plaintiff, who was owner of the cargo, or implied warranty in ordered his broker to procure an insurance from Madeira for the voyage to every policy, Charlestown, which was accordingly done; but he did not communicate to his broker or the underwriter two letters which he had received from his captain, there need be no representation made the day before he effected the insurance, stating that the ship had arrived at Madeira, but was very leaky, and that the pipes of wine had been half covered at the time of her condition; for ed with water. But it was proved at the trial that the leak had been completely stopped before she sailed from Madeira, and of course before the commencement of the risk insured. In her voyage to Charlestown she was taken, and the plaintiff abandoned. if she sails without being so,

Lord Mansfield told the jury that "there should be a representation of every thing relating to the risk which the underwriter has to run, except it be co-

there is no valid policy."

Insuring a ship by an English name does not amount to a representation that she is an English ship.

Any person acting by the orders of the insured, and who is in anywise instrumental in procuring the insurance, is bound to disclose all [355] he knows to the underwriters before the policy is effected; and when any misrepresentation arises from his fraud or negligence, the policy is void.

vered by a warranty. It is a condition or implied warranty in every policy, that the ship is seaworthy, and, therefore, there need be no representation of that. If she sailed without being so, there is no valid policy. Here the leak was stopped before they sailed from Madeira, and she sailed in good condition from thence; and there is no occasion to state the condition of a ship or cargo, at the end of her former voyage." There was a verdict for the plaintiff.

17. CLAPHAM v. CALAGAN. E. T. 1813. N. P. 3 Campb. 382.

The facts have been detailed before.

Per Cur. The mere calling the ship by an English name, does not amount to a warranty or representation that she is English; she might have been an American, or an English prize, preserving her original name, or a ship built on the continent, whose name was translated into English.

18. FITZHERBERT v. MATHER. M. T. 1785. K. B. 1 T. R. 12.

Action on a policy of insurance for 100*l.* underwritten by the defendant on the 21st of September, 1782, at six guineas per cent., on a cargo of oats, on board the ship *Joseph*, lost or not lost, at and from Hartland to Portsmouth, beginning the adventure from the loading thereof on board the ship at Hartland. The defendant pleaded the general issue, and paid the premium into court. This cause came on to be tried before Mr. Justice Buller, at Guildhall, when a verdict was found for the plaintiff, subject to the opinions of the Court upon the following case: That on the 27th of July, 1782, William Bundock, of Pool, agent for the plaintiff, contracted with Richard Thomas, of Hartland, a corn-factor, for the purchase of 500 quarters of oats, to be consigned to William Fuller, at Portsmouth, on the plaintiff's account; and desired Thomas to send him (Bundock) a bill of lading and invoice, and also a like bill of lading and invoice to the plaintiff at Mr. Fisher's, at the Tower, London. That, in pursuance thereof, Thomas shipped the oats on board the ship insured, which sailed from Hartland on the 16th September, 1782, and was lost the same day off the pier of Hartland; that on the 16th of September, 1782, Thomas wrote the two following letters to William Bundock and to Fisher:—

"To Mr. William Bundock,

Hartland, September 16, 1782.

"Sir,—This morning I loaded the *Joseph* with 175 quarters of oats to the address of William Fuller, Portsmouth, and the sloop sailed immediately, but I am afraid the wind is coming to the westward, and will force her back. I have sent a bill of lading and a letter by the captain to Mr. Fuller, and also a bill of lading and invoice to Mr. Fisher, that he may insure if he likes, as the equinox is near, &c.

"R. THOMAS."

"To Cuthbert Fisher, Esq.

Hartland, Sept. 16, 1782.

"Sir,—By an order of Mr. William Bundock, of Pool, I shipped, this day, on board the *Joseph*, which immediately set sail for Portsmouth, a cargo of oats as under; and by the same order, as well as the order of Thomas Fitzherbert, Esq. I took the liberty of drawing on you at the three days' sight, in favour of Messrs. Scott and Willis, or order, 106*l.*, to be placed to the account of Thomas Fitzherbert, Esq. I wish the whole safe to hand; and expect another vessel to be loaded this week, weather permitting; this evening appears stormy.

"R. THOMAS."

Lord Mansfield. This policy is effected by misrepresentation, and that misrepresentation arises from the proper agent of the plaintiff, who gives the intelligence. Now whether this happened by fraud or negligence, it makes no difference; for in either case the policy is void. As to the misrepresentation, the underwriter was warranted on the information of the agent to take for

* A statement made by the broker at the time of effecting a policy, that the ship was ready to sail on a particular day, when in fact she had sailed on the day before, held to be such a material misrepresentation as to vitiate the policy; see *Ellis v. Bratton*. 1 Park, Ins. 292.

granted that the ship was safe at twelve or one o'clock of the 17th of September; for the agent gives an account of the ship being loaded, and says, "I wish the whole safe to hand." Then there was a strong ground to believe on this letter that she was safe when the post came away, and the postmark shows the day when the letters were sent. How does this misrepresentation come? Why, from Thomas, who writes to Fisher, and gives him notice of the ship's sailing on purpose that he may insure; for so he says expressly in his letter to Bundock. He was honest at the time he wrote the letter; but on the 16th, at night, he hears that the ship is gone ashore, and in the morning, he knew that she was absolutely lost. The post did not go out till the afternoon of that day, and he had full opportunity to send an account of the loss. If Thomas was not guilty of fraud, at least, he was guilty of gross negligence; but either way, if he were perfectly innocent, this policy, being effected by misrepresentation, is void.

19. *BOWDEN v. VAUGHAN*. H. T. 1809. K. B. 10 East, 415.

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Previous to the effecting of the insurance, a letter had been received by the plaintiff from his correspondent, dated Lisbon, 27th of October, 1807, in which the writer advises him that he had consigned to him 1828 hides, by the *Almirante Nelson*, which were to be insured, stating that she was a Portuguese ship, and would sail in a few days. This letter was not shown to the underwriters at the time of subscribing the policy, but the broker represented that the ship was to sail in a few days; and he said upon his examination, that if it had been represented that the ship was not to sail in less than a month, the insurance could not have been effected, the French army, marching to the attack of Portugal, being then daily expected at Lisbon. There was no doubt, therefore, of the materiality of the representation; and in fact, the vessel did not sail till the 29th of November, and was stopped by the enemy on the 30th, before she left the Tagus. Lord Ellenborough, C. J., left the case to the jury, advising them to consider that the person by whom the representation was made was the owner of goods, who could only speak of the sailing of the vessel from probable expectation, and that if such representation were made *bona fide*, it would not conclude him; and the jury, being of opinion that the representation had been made *bona fide* on probable expectation, found a verdict for the plaintiff. The Court were of the same opinion with the Lord Chief Justice at the trial, that a representation as to the time of the ship's sailing, made by the owner of goods on board, must, from the nature of the thing, be considered only as a probable expectation, he having no control over the event.—Rule refused.

20. *HUBBARD v. GLOVER*. M. T. 1812. N. P. 3 Campb. 313.

Action on a policy of insurance. The policy was subscribed by the defendant on the 17th of June, 1811. Before subscribing it, he wished a warranty to be introduced, that the ship should sail before the 1st of August, upon which the broker observed, "There is no occasion for that; the ship has sailed some time, and must now be at Gottenburgh; there is a cargo for her, and she is sure to be an early ship." In point of fact she had reached Gottenburgh some days before the conversation, and she performed her voyage to Cronstadt without any accident or delay. The captain from his arrival there was not sent alongside till the 8th of September; on the 30th of the same month, the ship sailed on the homeward voyage, and, after lying some time at Matwick, was wrecked on the 11th of November, off the coast of Denmark. Before she sailed from Cronstadt the winter risk had begun, and the current premium had risen to thirty guineas, to return ten.

Lord Ellenborough. Had the desired warranty been introduced into the policy, that would have been falsified, and the underwriters would have been discharged. But I find no representation here upon the falsity of which they can defend themselves; the broker said the ship had sailed some time, and must then have reached Gottenburgh; that a cargo was provided for her; and that she must be an early ship. Of these circumstances only the first could be considered as within his own knowledge, and that was true; the next was

So, where a broker on effecting a policy while the ship was on her outward voyage, represented that a cargo was ready for her, and that she was sure to be an early ship, this was considered as only expressing expectation and be

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lief, and the underwriters were liable.*

likewise true, although only matter of probable conjecture, for the ship had reached Gottenburgh some days before. He said, in unqualified terms, that a cargo was ready; but this, from its very nature, was the only subject of expectation and belief. Neither he nor his principal could be supposed to have been at Cronstadt or Petersburg to see the cargo in a warehouse, or on the wharf there; and I believe it is by no means an unusual thing to have a cargo of Russian produce prepared for any particular ship before she sails on the outward voyage. All the broker could be understood to mean was, that a cargo had been ordered for the ship in question, and that there was every reason to suppose it would be ready for her by the time of her arrival, so that she might be expected to be an early ship. We have no evidence that this representation does not perfectly accord with the truth. The defendant, instead of insisting upon the warranty, chose to speculate upon probabilities. He erred in his calculation, but that is no reason why he should not pay the loss—Verdict for the plaintiff.

(R) RELATIVE TO CONCEALMENT.†

1. LYNCH v. DUMFORD. M. T. 1811. K. B. 14 East, 494. SOME v. HAMILTON. T. T. 1816. C. P. 3 Taunt. 37. WILLER v. GLOVER. M. T. 1811. C. P. 1 N. R. 14. S. P. DURRELL v. BEDERLEY. H. T. 1816. N. P. Holt, 283.

Every intelligence, though eventually it prove false, which may influence the underwriter's determination must be communicated.

An insurance was effected on goods on board ships from the Canary islands to London, and at the time the assured's agent, who effected the policy, knew that one of the ships was named the President, and at the same time there was a paper of communication stuck up at Lloyd's, that the Howard, Marsh, arrived off Dover from Teneriffe, sailed on the 24th ult.; on the 27th, off the Salvages, fell in with the President, Owen, from Lanzarette, deep and leaky. But the agent did not communicate his knowledge of the ship's name to the underwriters.

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Lord Ellenborough, C. J. The duty of the assured or his agent in making such communications of material circumstances within their knowledge must attach at the time of effecting the assurance, an cannot depend upon the subsequent event. There is no case perhaps exactly like this in species, but others have been decided involving the same principles, that the assured is bound to communicate to the underwriters every thing material to the risk within his knowledge at the time. Here, coupling the peculiar knowledge which the agent had of the name of the ship on board of which the goods were loaded, with the information contained in the paper stuck up at Lloyd's, it cannot be said that the fact was not material to be communicated to the underwriters; with the knowledge of such a fact kept back from them, can they be said to have contracted upon equal terms? The intelligence announced in the paper at Lloyd's was nothing to the underwriters, unless they had the means of applying it to the particular ship or goods in which the assured were interested. If the underwriters had had the knowledge possessed by the assured, it might have been a question with them, whether they would have insured at all; or, if they did, whether they would not have required an enhanced premium.

2. KEWLEY v. RYON. T. T. 1794. C. P. 2 H. Bl. 343.

But nothing need be communicated but what is material to the risk.

A policy of insurance is effected on certain goods on board a certain ship on a voyage at and from A. to B., and another policy is also made on any kind of goods, as interest should appear, on board ship or ships on the same voyage, warranted to sail within time; but no circumstances relating to the first policy are communicated to the underwriters of the second, nor do they know

* If it be said in a letter that a ship will sail from St. Domingo in the month of October, it is generally understood that she will not sail till the 25th of that month; Charaud v. Angerstein, Peake, 43.

† A policy of insurance being founded in speculation, and a knowledge of facts being necessary to enable an underwriter to calculate the chances and form a due estimate of the risk, it is a fixed rule that not only a misrepresentation, but even a concealment of circumstances within the knowledge of the insured, or his agents, which are calculated to enable the underwriters to form a due estimate of the risk, will vitiate a policy; see 4 Bra. P. C. 462.

that the first was made good to the full amount of the sum insured in the first policy are put on board the specified ship, which arrives in safety. Goods also to the full amount of the sum insured in the second policy are put on board another ship, which sails within the time limited from A., with an intention to touch at C. in her course to B., but is lost before she arrives at the deviating point. *Per Cur.* The question, therefore, was, whether the letter of the 24th of May, by which Freeland and Righy directed an insurance to be made on the Elizabeth, and the actual circumstances of that insurance, ought to have been communicated to the underwriters on the present policy? But as nothing was necessary to be disclosed but what was material to the risk run, and as the assurance on the Elizabeth was not material to that risk, the concealment was not fraudulent, and therefore could not affect the right of the plaintiff's to recover.

3. *WILKES V. GLOVER. M. T. 1786. K. B. 1 T. R. 14.*

In an action on a policy of insurance, on goods on board the ship W., from Berderygge to London, it appeared that the shippers, on the 30th of November, 1802, wrote to the plaintiffs, who were the consignees, in these words: "I think the captain will sail to-morrow; but should he not be arrived in your port, you will be so kind as to make the insurance as low as you possibly can fraud, vit for my account." This letter having been received by the plaintiffs on the 13th of December, they effected a policy on the next day, without communicating the letter to the underwriters. It was also proved that it was not the custom for ships to sail from Berderygge to London without a fair wind; that the voyage was often performed in four or five days, and when the weather was not very favourable, in about ten days. The ship W. did not in fact sail until the 24th of December. The jury found a verdict for the plaintiffs. On a motion for a new trial, it was contended, that, as the ship did not sail until ten days after the policy was effected, the risk was in no respect varied by the concealment of the letter; that unless the circumstance concealed would vary the amount of the premium the concealment would not vitiate the policy; that the expectation of the shipper in this case, which was not realized by the sailing of the ship at the expected time, was not material, and therefore need not be communicated to the underwriters. [359]

But Sir J. Mansfield, C. J., conceived that the letter was material to be communicated to the underwriters, in order that they might have an opportunity of exercising their judgment in settling the premium. Had it not been for the opinion of the jury he should not have entertained the least doubt on the subject. But though great respect was due to their opinion, still he thought their judgment had been too hastily formed, and that the case ought to be reconsidered.

4. *LYNCH V. DUNSFORD. M. T. 1811. K. B. 16 East, 494. HUME V. HAMILTON. T. T. 1810. C. P. 3 Taunt. 37.*

An insurance was effected on goods on board ship or ships from the Canary islands to London; and at the time the assured's agent, who effected the policy, knew that one of the ships was named the President; and at the same time there was a paper of communication stuck up at Lloyd's, that the Howard, Marsh, arrived off Dover from Teneriffe, sailed 24th ult.; on the 27th, off the Salvages, fell in with the President, Owen, from Lanzarette, deep and leaky; but the agent did not communicate his knowledge of the ship's name to the underwriters. Lord Ellenborough, C. J. The duty of the assured or his agents in making such communications of material circumstances within their knowledge must attach at the time of effecting the insurance, and cannot depend upon the subsequent event. There is no case perhaps exactly like this in species; but others have been decided involving the same principle, that the assured is bound to communicate to the underwriters every thing material to the risk within his knowledge at the time. Here, coupling the peculiar knowledge which the agent had of the name of the ship on board of which the goods were loaded, with the information contained in the paper stuck up at Lloyd's, it cannot be said that the fact was not material to be communicated. The materiality of any communication is not to be proved by the event.

ted to the underwriters. With the knowledge of such a fact kept back from them, can they be said to have contracted upon equal terms? The intelligence announced in the paper at Lloyd's was nothing to the underwriter, unless they had the means of applying it to the particular ship or goods in which the assured were interested. If the underwriters had had the knowledge possessed by the assured it might have been a question with them whether they would have insured at all; or if they did, whether they would not have required an enhanced premium.

5. *CARTER V. BOEHM*. E. T. 1759. K. B. 1 Blac. Rep. 593. S. P. NOBLE V. RENNOWAY. M. T. 1780. K. B. Doug. 510. S. P. VALLONU V. DEWAR. M. T. 1808. N. P. 1 Campb. 503. OUGRES V. JENNINGS. M. T. 1800. N. P. Id. 505.

It must be a concealment of [360] private, not of public, facts; so, mere speculations or private conclusions drawn by the insured from facts need not be communicated.

This was an insurance on a policy, interest or no interest, without benefit of salvage. The insurance was made by the plaintiff for the benefit of his brother, Governor George Carter. The jury found a verdict for the plaintiff, upon which a new trial was moved for on the ground that circumstances had not been sufficiently disclosed. Lord Mansfield reported the evidence given at the trial, by which it appeared that it was a policy of insurance for one year, namely, from the 16th of October, 1760, for the benefit of the Governor of Fort Marlborough, George Carter, against the loss of Fort Marlborough, in the island of Sumatra, in the East Indies, by its being taken by a foreign enemy. The event happened, the fort was taken by Comte D'Estaigue, within the year. The first witness was Cawthorne, the broker, who produced the memorandum given by the governor's brother, the plaintiff, to him, and the use made of these instructions was to show that the insurance was made for the benefit of Governor Carter, and to insure him against the taking of the fort by a foreign enemy. Both parties had been long in Chancery, and the depositions there made on both sides were read as evidence upon this trial. It was objected, on behalf of the defendant, to be a fraud by concealment of circumstances which ought to have been disclosed, and particularly the weakness of the fort, and the probability of its being attacked by the French, which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother, Roger Carter, his trustee, and the plaintiff in this case; the second was from the governor to the East India Company. The evidence in reply to this objection consisted of three depositions in Chancery, setting forth that the governor had 20,000*l.* in effects, and had only insured 10,000*l.*, and that he was guilty of no fault in defending the fort. The first of these depositions was Captain Tryon's, which proved, that this was not a fort proper or designed to resist European enemies, but only calculated for defence against the natives of the island of Sumatra; that the governor's office is not military but only mercantile; and that Fort Marlborough is only a subordinate factory to Fort St. George. There was no evidence to the contrary, and a special jury found a verdict for the plaintiff; after argument at the bar upon the motion for a new trial, and time taken by the Court to deliberate, their unanimous opinion was delivered by,

Lord Mansfield. This is a motion for a new trial. In support of it, the counsel for the defendant contended that some circumstances in the knowledge of Governor Carter, not having been mentioned at the time the policy was underwritten, amount to a concealment which ought, in law, to avoid the policy. The counsel for the plaintiff insist that the not mentioning these particulars does not amount to a concealment, which ought, in law, to avoid the policy either as a fraud, or as varying the contract. 1st. It may be proper to say something in general of concealment, which avoids a policy. 2nd. To state particularly the case now under consideration. 3rd. To examine whether the verdict which finds this policy good, although the particulars objected were not mentioned, is well founded. First. Insurance is a contract upon speculation. The special facts upon which the risk is to be computed lie most commonly in the knowledge of the insured only; the underwriter trusts to his statement, and proceeds upon confidence that he does not keep back any cir-

cumstances within his knowledge to mislead the underwriter into a belief that the circumstance does not exist; the keeping back such circumstances is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement. [361] The policy would be equally void against the underwriter if he concealed any thing, as if he insured a ship on her voyage which he privately knew to be arrived; and an action would lie to recover the premium. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary; but either party may be innocently silent as to grounds open to both to exercise their judgments upon. *Aliud est celare jacere neque enim id est celare quicquid reticeas sed cum quod tu scias id ignorare emolumenti sui causa velis eos, quorum intersit id scire.* This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favour of the party misled by his ignorance of the thing concealed. There are many matters as to which the insured may be innocently silent. He needs not mention what the underwriter knows. *Scientia utrinque par pares contrahentes facit*, an underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew, what way soever he came to the knowledge; the insured needs not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waives being informed of. The underwriter needs not to be told what lessons the risk agreed and understood to be run by the express terms of the policy; he needs not to be told generally topics of speculation; as, for instance the underwriter is bound to know every cause which may occasion natural perils, as the difficulty of the voyage, the kind of season, the probability of lightning, hurricanes and earthquakes. He is bound to know every cause which may occasion political perils, from the rupture of states, from war, and the various operations of war. He is bound to know the probability of safety from the continuance and return of peace, from the enemy through the weakness of their councils, or their want of strength. If an underwriter insure private ships of war by sea and on shore, from ports to ports and from places to places any where, he needs not be told the secret enterprizes upon which they are destined, because he knows some expedition must be in view, and from the nature of his contract he waives the information without being told; if he insure for three years, he needs not be told any circumstance to shew it may be over in two; or if he insure a voyage with liberty of deviation, he needs not be told what tends to show there will be no deviation. Men argue differently from natural phenomena and political appearances; they have different capacities, different degrees of knowledge, and different intelligence; but the means of information and judging are open to both; each professes to act from his own skill and sagacity, and therefore neither needs to communicate to the other. The reason of the rule which obliges the parties to disclose is to prevent fraud and encourage good faith; it is adapted to such facts as vary the nature of the contract, which one privately knows and the other is ignorant of, and has no reason to suspect. The question, therefore, must always be, whether there was, under all the circumstances at the time the policy was underwritten, a fair statement, or a concealment, fraudulent if designed, or, though not designed, varying materially the object of the policy and changing the risk understood to be run? Secondly. This brings me in the second place to state the case now under consideration. The policy is against the loss of Fort Marlborough, from being destroyed by, taken, or surrendered unto any European enemy, between the 16th of October, 1759, and the 16th of October, 1760. The underwriter knew at the time that the policy was to indemnify to that amount George Carter, the Governor of Fort Marlborough, [362]

in case the event insured against should happen. The governor's instructions for the insurance, bearing date at Fort Marlborough, the 22nd of September, 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the East India Company, which the Company offered to put into my hands, but would not deliver it to the parties, because it contained some matters which they did not think proper to be made public. An objection occurred to me at the trial, whether a policy against the loss of Fort Marlborough, for the benefit of the governor, was good, upon the principle which does not allow a sailor to insure his wages. But considering that this place, though called a fort, was really but a factory or settlement for trade, and that he, though called a governor, was really but a merchant; considering too, that the law allows a captain on a ship, if he be a part owner, and the captain of a privateer, if he be a part owner, to insure his share; considering also that the objection could not, upon any ground of justice, be made by the underwriters, who knew him to be governor at the time he took the premium, as with regard to the principles of public convenience the case so seldom happens (I never saw one before), any danger from the example is so little to be apprehended, I did not think myself warranted upon that point to nonsuit the plaintiff, especially as the objection did not come from the bar. Though this point was mentioned at the last trial, it was not insisted upon, nor has it been seriously argued upon this motion, as sufficient alone to vacate the policy; and if it had, we are all of opinion that we are not warranted to say that it is void upon this account. Upon the plaintiff's obtaining the two former verdicts the underwriters went into a court of equity, where they had an opportunity to sift every thing to the bottom to get every discovery from the governor and his brother, and to examine any witnesses that were upon the spot. At last after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term. The plaintiff proved without contradiction that the place called Bencoolen or Fort Marlborough is a factory or settlement, but no military fort or fortress; that it was not established for a place of arms or defence against the attacks of an European enemy, but merely for the purpose of trade and of defence against the natives; that the fort was only intended and built to keep off the country blacks; that the only security to European ships of war consisted in the difficulty of the entrance and navigation of the river for want of proper pilots; that the general state and condition of the said fort and of the strength thereof were in general well known by most persons conversant or acquainted with Indian affairs, and of the state of the Company's factories or settlements, and could not be kept secret or concealed from persons

[363] who should endeavour by proper inquiry to inform themselves; for there were no apprehensions or intelligence of any attack by the French until they attacked Nattal in Feb. 1760, and on the 8th of Feb. 1760, there was no suspicion of any design by the French; that the governor at that time bought of the witness goods to the value of 4,000*l.*, and had goods to the value of above 20,000*l.*, and then dealt for 50,000*l.* and upwards; that on the 1st of April, 1760, the fort was attacked by a French man of war of 64 guns, and a frigate of 20 guns under the Comte D'Estaigue, brought in by Dutch pilots, was unavoidably taken, and afterwards delivered to the Dutch, the prisoners being sent to Batavia. On the part of the defendant: After all the opportunities of inquiry, no evidence was offered that the French ever had any design upon Fort Marlborough before the end of March, 1760, or that there was the least intelligence or alarm that they might make the attempt till the taking of Nattal, in the year 1760; they did not offer to disprove the evidence that the governor had acted as in full security long after the month of September, 1759, and had turned his money into goods so late as the 8th of February, 1760; there was no attempt to show that he had not lost by the capture very considerably beyond the value of his insurance. But the defendant relied upon a letter written to the East India Company, bearing date the 16th of September, 1759, which

was sent to England by the Pitt, Captain Wilson, who arrived in May, 1760, together with the instructions for insuring; and also a letter, bearing date the 22nd of September, 1759, sent to the plaintiff by the same conveyance and at the same time, which letters his lordship repeated. They relied too upon the cross-examination of the broker who negotiated the policy. That in his opinion these letters ought to have been produced or the contents disclosed, and that if they had the policy would not have been underwritten. The defendant's counsel contended at the trial, as they have done upon this motion, that the policy was void; 1st. Because the state and condition of the fort mentioned in the governor's letter to the East India Company was not disclosed. 2nd. Because he did not disclose that the French, not being in a condition to relieve their friends upon the coast, were most likely to make attack upon this settlement, rather than remain idle. 3rd. That he had not disclosed his having received a letter, dated the 4th of February, 1759, from which it seemed that the French had a design to take this settlement by surprise the year before. They also contended that the opinion of the broker was almost decisive. The whole was laid before the jury, who found for the plaintiff. Thirdly. It remains to consider these objections, and to examine whether this verdict is well founded. To this purpose it is necessary to consider the nature of the contract at the time it was made. The policy was signed in May, 1760. The contingency was, whether Fort Marlborough was or would be taken by an European enemy between October, 1759, and October, 1760. The computation of the risk depended upon the chance whether any European power would attack the place by sea; if they did, it was incapable of resistance. The underwriter at London in May, 1760, could judge much better of the probability of the contingency than Governor Carter could at Fort Marlborough in September, 1759: he knew the success of the operations of the war in Europe; he knew what naval force the English and French had sent to the East Indies; he knew, from a comparison of that force, whether the sea was open to any such attempt by the French; he knew, or might know, every thing which was known at Fort Marlborough in September, 1759, of the general state of affairs in the East Indies, or the particular condition of Fort Marlborough, by the ship which brought the order for the insurance; he knew that the ship must have brought many letters to the East India Company, and particularly from the governor; he knew what probability there was of the Dutch committing or having committed hostilities. Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by an European power. If there had been any design on foot or enterprise begun in September, 1759, to the knowledge of the governor, it would have varied the risk understood by the underwriter, on account of his not being told of a design or attack then subsisting; and he estimated the risk upon the foot of an uncertain operation, which might or might not be attempted. But the governor had no notice of any design subsisting in September, 1759. There was no such design; in fact, the attempt was made without premeditation, from the sudden opportunity of a favourable occasion, by the connivance and assistance of the Dutch, which tempted Comte D'Estaigne to break his parole. These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of the concealments. The first concealment is, that he did not disclose the condition of the place: the underwriter knew the insurance was for the governor; he knew the governor must be acquainted with the state of the place; he knew the governor, by insuring, apprehended at least the possibility of an attack. With this knowledge, without asking a question, he underwrote. By so doing he took the knowledge of the state of the place upon himself. It was a matter as to which he might be informed various ways; it was not a matter within the private knowledge of the governor only. But not to rely upon that, the utmost which can be contended is, that the underwriter trusted to the fort being in the condition in which it ought to be, in like manner as it is taken for granted that a ship insured is seaworthy. What is that condi-

tion? All the witnesses agree that it was only to resist the natives and not an European force. The policy insures against a total loss; taking for granted, that if the place was attacked it would be lost. The contingency, therefore, which the underwriter has insured against is, whether the place would be attacked by an European force, and not whether it would be able to resist such attack if the ship could get up the river.

[365] It was particularly left to the jury to consider whether this was the contingency in the contemplation of the parties; they have found that it was; and we are all of opinion that in this respect their conclusion is agreeable to the evidence. The state and condition of the place were material in this view only; in case of a land attack by the natives of the place; it is mere speculation of the governor from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror in his own dominions. The practicability of it in this case depended upon the English naval forces in those seas, of which the underwriter could better judge at London in May, 1760, than the governor could at Fort Marlborough in September, 1759. The third concealment is, that he did not disclose the letter from Mr. Winch of the 4th of February, 1759, mentioning the design of the French the year before. What that letter was, how he mentioned the design, upon what authority he mentioned it, or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery, and nothing has come out upon it as to this letter, which he thinks makes for his purpose. The plaintiff offered to read the account Winch wrote to the East India Company, which was objected to, and therefore it was not read. The nature of that intelligence, therefore is very doubtful; but taking it in the strongest light, it is a report of a design to surprise the year before, but then dropped. This is a topic of mere general speculation, which made no part of the facts of the case upon which the insurance was to be made. It was said, if a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud. I agree with it. But if he knew that two privateers had been there the year before, it would be no fraud not to mention that circumstance; because it does not follow that they will cruise this year at the same time and in the same place, or that they are in a condition to do it. If the circumstance of this design being laid aside had been mentioned, it would have tended rather to lessen the risk than increase it; for the design of a surprise which has transpired and been laid aside is less likely to be taken up again, especially by a vanquished enemy. The jury considered the nature of the governor's silence as to these particulars; they thought it innocent, and that the omission to mention them did not vary the contract; and we are all of opinion that in this respect they judged extremely right. There is a silence, not objected to at the trial nor upon this motion, which might, with as much reason have been objected to as the two last omissions, or rather more. It appears by the governor's letter to the plaintiff that he was principally apprehensive of a Dutch war. He certainly had what he thought good grounds for this apprehension; *Compte D'Estaigne* being piloted by the Dutch, delivering the fort to the Dutch, and sending the prisoners to Batavia, is a confirmation of those grounds. Probably the loss of the place was owing to the Dutch; the French could never have got up the river without Dutch pilots, and it is plain the whole was concerted with them. And yet at the time of underwriting the policy there was no intimation about the Dutch. The reason why the counsel have not objected to his not disclosing the grounds of this apprehension is, because it must have arisen from political speculation and general intelligence; therefore they agree it is not necessary to communicate such things to an underwriter. Lastly, great stress was laid upon the opinion of the broker; but we all think the jury ought not to pay the least regard to it; it is mere opinion, which is not evidence. It is opinion after an event; it is opinion without the least foundation from any previous precedent or usage; it is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and

jury were to determine the cause, and, therefore, it is improper and irrelevant in the mouth of a witness. There is no imputation upon the governor as to any intention of fraud. By the same conveyance which brought his orders to insure, he wrote to the Company every thing which he knew or suspected; he desired nothing to be kept secret which he wrote either to them or his brother. His subsequent conduct, down to the 8th of February, 1760, showed that he thought the danger very improbable. The reason of the rule against concealments is, to prevent fraud and encourage good faith. If the defendant's objections were to prevail in the present instance, the rule would be turned into an instrument of fraud. The underwriter here, knowing the governor to be acquainted with the state of the place, knowing that he apprehended danger, and must have some grounds for his apprehension, being told nothing of either, signed this policy, without asking a question. If the objection that he was not told is sufficient to vacate it, he took the premium, knowing the policy to be void, in order to gain if the alternative turned out one way, and to make no satisfaction if it turned out the other; he drew the governor into a false confidence that, if the worst should happen, he had provided against total ruin, knowing at the same time that the indemnity to which the governor trusted was void. There was not a word said to him of the affairs of India or the state of the war there, or the condition of Fort Marlborough; if he thought that omission an objection at the time he ought not to have signed the policy with a secret reserve in his own mind to make it void; if he dispensed with the information, and did not think this silence an objection, then he cannot take it up now after the event. What has been often said of the statute of frauds may with more propriety, be applied to every rule of law drawn from principles of natural equity to prevent fraud, that it should never be so turned, construed, or used, as to protect or be a means of fraud. After the fullest deliberation, we are all clear that the verdict is well founded, and that there ought not to be a new trial; consequently, that the rule obtained for that purpose ought to be discharged.

If facts, not disclosed by the broker for the insured, in a representation of the state of the ship, appear material to the jury, though they did not to the broker, who merely on that account abstained from mentioning them, the insurance is void.*

6. *SHIRLEY v. WILKINSON*. M. T. 1779. K. B. Doug. 306.

Upon a motion for a new trial, Lord Mansfield, and the rest of the Court, were clearly of opinion that if the broker, at the time when the policy is effected, in representing to the underwriter the state of the ship and the last intelligence concerning her, does not disclose the whole, and what he conceals shall appear material to the jury, they ought to find for the underwriters, the contract in such case being void, although the concealment should have been innocent, the facts not mentioned having appeared immaterial to the broker, and having not been communicated merely on that account.

7. *WEIR v. ABERDEEN*. H. T. 1819. 2 B. & A. 320.

A ship insured at and from a port sails on her voyage in an unseaworthy state, in consequence of having a greater cargo than she could safely carry; the defect is discovered before any loss accrued, and part of the cargo is discharged, and a loss subsequently accrues, in no degree attributable to her having been overladen in the early part of her voyage.

Where a ship, having sailed on the voyage, was found to labour and strain much from being overladen, and on application to the underwriters for liberty to go into port to discharge part of her cargo, they

Per Cur. There was not any fraud or concealment in this case, so as to vacate the memorandum; for it distinctly appears that the underwriters were told that the ship had been overloaded, and that, from that circumstance, she was in an unseaworthy state. As to the fact relied upon, that the ship had strained, it is to be observed that if that straining had rendered her unseaworthy the non-communication of that fact would have vacated the policy; but as the jury have negatived that, the fact was immaterial, and therefore it was unnecessary to communicate it to the underwriters. The question then is, whether the memorandum required a new stamp? And the case of *Hubbard v. Jackson*, 4 Taunt. 174. is an authority to show that a warranty may be waived by a memorandum on the policy, without a new stamp. Now it is a warranty that the ship shall be seaworthy, and therefore it does not require a memorandum.

* Any person acting by the orders of the insured, and who is in anywise instrumental in procuring the insurance, is bound to disclose all he knows to the underwriter before the policy is effected; See *Fitzherbert v. Mather*, 1 T. R. 12.

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dum with a new stamp in order to waive it. A warranty to sail within time is of the same nature; and yet it had been held, that after the period when the condition has terminated, the parties may still by an unstamped memorandum continue the policy; and if they may do so in one case they may do so equally in the other. It has been said that the memorandum here was added after the determination of the risk by the original sailing of the ship in an unseaworthy state; but that depends upon a misconstruction of the words "determination of the risk insured." Upon this point it will be sufficient to advert to the language of the Court in *Kensington v. Inglis*, 8 East, 291. There the insurance was on goods on board ship which should sail before the 1st of June, and the memorandum enlarging the time of sailing to the 1st of August was not added till the 10th of June; and the objection was there taken as here, that the risk had been determined. But Lord Ellenborough said, that the objection was founded on a misapplication of the terms "determination of the risk insured," which means that determination of it which is occasioned by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage; and that it was sufficient that the memorandum was written on the policy before any of these events happened. On these grounds we are of opinion that the memorandum in this case did not require a new stamp, and that the verdict is right.

8. *FREELAND v. GLOVER*. T. T. 1806. K. B. 3 Smith, 425; S. C. 7 East, 457.

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Upon an action on a policy of insurance on goods in the ship *Neptune*, *Skekon*, master, at and from twenty-four hours after her first arrival at her first place of trade on the coast of Africa, and at and from thence to Liverpool, during her stay and trade on the said coast of Africa and African islands, at a premium of 26l. 5s. per cent., the following case was proved: The ship sailed the 9th of June, 1799, with twelve guns and twenty men, from Liverpool, one Fisher being master, and arrived without accident at Gahoon, 7th of August, 1799, and traded on the coast, remained there about ten days, and went to the Cameroons, where they arrived the 29th of August, 1799; they stayed about eight weeks trading there, and the crew were then very sickly; thence they sailed to Old Calabar, where they remained about five weeks, and took on board seven puncheons of palm oil, and two puncheons of pepper, and buried two of their crew, the rest being sickly. About the latter end of November, or beginning of December, 1799, they sailed from Old Calabar, bound to Gahoon, to take on board their wood, and one more of the crew died. On the 19th of December, in standing along shore off the river Danger, some black people in canoes came to the ship to make trade, and on their getting on board they attacked the crew, and killed the captain and steward, and one landsman, and severely wounded the remainder, and they had afterwards plundered the vessel of every thing they could find, and cut away the running rigging. The crew, after a severe conflict, drove the black people overboard, and got possession of their vessel again. They then proceeded to Bembea, where they arrived in a very deplorable condition, being all sick and wounded. After remaining about seven or eight weeks there, repairing their rigging, refitting the ship, and getting themselves refreshed, they sailed for Gahoon, and arrived on or about the 24th day of March, 1800, having then only nine people on board. They continued at Gahoon three months, and there took on board 16,149 billets of red wood, being all that the natives would suffer them to take; but the natives took and kept by force from the *Neptune* her two boats. They sailed to the island of St. Thomas, and there procured a boat. On the 16th of June, they sailed from thence, and proceeded on their voyage, bound to Liverpool; but the vessel being very foul bottomed, they could beat very little to windward, and they met with very bad weather. On the 3rd of July they had a heavy gale of wind in squalls, and they thereby lost a number of their sails; some of their rigging gave way by stress of weather, and they were driven to leeward. The vessel was very leaky, and on the 1st of August they made Prince's Island, but

they could not fetch the harbour until about six or seven weeks afterwards, the crew being all very sickly, and the then captain, George Skelton, confined to his bed, and not expected to live. Not being able at Prince's Island to get the ship repaired, she was condemned, and the ship and cargo sold, but the owners had received none of the produce. When the ship sailed from Liverpool she was well victualled and stored, with spare rigging and provisions; but after the ship left Bembea she had nothing to spare. When the insurance was effected, the agent produced to the underwriters the following letter of the 21st of April, 1800, but did not produce the letter of the previous date, of February, 1800, to which it refers. It was objected at the trial, that the assured should have communicated both the letters: but Lord Ellenborough, C. J., before whom the cause was tried, held that it was sufficient to communicate only the second. The premium was very high, and one of the special jury expressed great surprise that any insurance was obtained. The ship traded only in produce and not in negroes. There was a verdict for the plaintiff, and afterwards a rule was obtained to show cause why there should not be a new trial, upon the ground of fraud, in not communicating the letter of the date of the 15th of February, 1800. The letters were as follows:—

(From Skelton, the master, to his owner.)

"Bembea, Feb. 15, 1800.

"I am sorry to inform you of the melancholy circumstance that happened on board the snaw Neptune, off Cape St. John's, close to the river Danger. Captain Fisher, finding all the ship's crew in a very bad fever, thought it proper to stand in shore, and get some stores for the sick. Three canoes came off and spoke very good English; we bought six fowls from them; but the blacks began to be very impudent. The captain told the boatswain to give them a cutlass, which he did; but the blacks soon took it from him, and killed him dead on the spot, and stabbed him in twenty places. They killed the steward and one of the landsmen; the rest of the people were all very much wounded. There were a good many of the blacks killed on the deck by the boatswain and two of our men; all the rest in a very dangerous fever. The second mate, Mr. Cane, died four days afterwards, from a fever and his wounds together. At this time, only six hands left alive; our condition is to be pitied; we were fourteen days at sea before we reached Bembea, where the Neptune lies. I have buried the boatswain since my arrival here. I am sorry to inform you that there are only five left alive in the ship, and I cannot get one man here, nor in Calabar, nor in the Camaroons, and what to do I do not know. We are all very sickly on board; we have on board about six tons of ivory, six puncheons of palm oil, two puncheons of pepper, two casks of bees-wax; that is what I have on board at present, till I get to Gibon, where our wood is. I am sorry to inform you that John Beeri's son was on board at the time they had possession of the ship; they plundered the ship of all our clothes, and several other things which I cannot mention. We are all in a sickly state on board, and our cabin stores are all gone; but that I do not mind, if I only had men to get the ship to Gibon, to get our wood.

"GEORGE SKELTON."

"Gibon River, April 21st, 1800.

"We arrived in Gibon River on the 24th of March, and have only got on board one-third of our red wood, the most part by our long boat. The natives finding us weakly-handed, and our goods taken from us, they do as they please. I have nine men on board now, but provisions run very low. You may think the trouble and fatigue I have with the natives on shore, and I do not expect to get all my wood till the latter end of next month, when you may expect me sailing. The wood in general is all very small billet; the ivory, palm oil, bees'-wax, and pepper, I made mention of in my last letter; I got 5000 billets of choice wood from Prince William side, every billet as big as four of the billets at Batavia side. It is a great hurt to me staying so long here; but you may depend I do my endeavour to get the wood off, for I go myself in the long boat, and made the mate, and that is all I have to depend on, and he has no navigation. Captain

Eccles, of the ship *Amerall*, arrived yesterday from Camaroons. You must excuse this letter; I was in a very great hurry when I wrote it, for the *Ruby* brig was under weigh when I wrote it. I have no more to say at present."

[369] *Per Cur.* "We have nine men now, but our provisions are very much diminished." That shows that he thought it an advantage that he was in a better state than before; but, as a drawback upon that, he adds, that his provisions seem short. In a case of this sort, it is sufficient if there be a communication of all that relates to the present situation of the ship, and sufficient to lead to other inquiries as to what may be doubtful; for we are to take into our consideration, that the person who underwrites is acquainted with the nature of the voyage, and the course of the trade. The insurance is from twenty-four hours after her arrival, and the trade is principally a coasting trade; for they carry out articles which they barter from one place to another, for slaves or for gold dust. "We arrived in Gibon River the 24th of March." This might be the place of their first arrival or not; but he meditates his return, and says that he has been getting bees'-wax somewhere else, and that he had here to get wood for his return home. He was not to go to the West Indies; and he shows that he had written another letter before. The underwriters, therefore, knew that this was a second letter, and consistently with this there might be a great many letters. He states what his condition is at the time; he says, "The natives do as they please, as we are so weakly-handed;" that is, so few in number. The jury felt that it required a good long premium to get it underwritten at all. If the underwriter wished for more information, he should have asked for the other letter. In *Heywood v. Rogers*, it was held that if, upon any question asked, there had been a concealment, that fact would have been decisive against the claim for the insurance; but if he communicates all that is true as to her immediate situation, that is sufficient; and here is enough to create a motive for further inquiry. It is sufficient if he communicates what is true at the time, and enough to lead to further inquiry. "Nine men now." The average crew might be eighteen men; but what matter was it whether they died by the sword or by disease? That is immaterial. But it is enough that the plaintiff communicated what was true, and laid a ground for other communications, which the defendant might have had if he had asked for them. It could never be understood that this was the first arrival; for the ships stay some times two years on the African coast, and are like factory ships. There is no ground to say here that there was a suppression of any material fact.

A concealment by the captain from the owner of a material injury sustained, is, as between the owner and underwriter, a concealment.

Concealment of the true port of loading;

9. *GLADSTONE V. KING*. H. T. 1813. K. B. 1 M. & S. 35.

A policy of insurance was on goods at and from Pernambuco to Maranhão, and thence to Liverpool, beginning the adventure on the goods from the loading thereof on board the ship, wheresoever: it was holden that a concealment by the captain from the owners of a material injury sustained, is, as between the owner and underwriter, a concealment.

10. *HODGSON V. RICHARDSON*. E. T. 1777. K. B. 1 Blac. 463.

A ship was insured "at and from Genoa," her loading consisting of perishable commodities. The loading was put on board at Leghorn, whence the vessel had sailed, bound for Dublin; but, losing her convoy, she had put into Genoa, where she lay nearly five months, and then sailed. The insurance was made a few days after the ship had sailed from Genoa, at which time the abovementioned circumstances were known to the insured, but not communicated to the underwriter. A few days after the ship put to sea, was shattered by a storm, and the cargo considerably damaged. In an action on the policy it was proved that it had always been considered as material to acquaint the underwriters whether the insurance was to be at the commencement or in the middle of a voyage. It was holden, that the plaintiff was not entitled to recover.

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Or time of loading.

11. *BRIDGES V. HUNTER*. H. T. 1813. K. B. 1 M. & S. 15.

The plaintiff's effected a policy of insurance on wines from Oporto to London, on the 12th of November, at which time they were in possession of two

letters from their correspondents at Oporto, the first of which, dated 11th of October, stated thus: "We are loading the wines on the Stag, Capt. Wheatley, who pretends to sail after to-morrow." The other, dated the 13th of October, enclosed the bills of lading, which were filled up "with convoy," which letter the plaintiffs did not communicate to the underwriters. Held that it was a material concealment.

12. *SAWTELL v. LONDON*. H. T. 1814. C. P. 1 Marsh, 99; S. C. 5 Taunt. 359.

Action on a policy of insurance, which was effected the 3rd of December, 1812, on the ship *Sophia*, at and from Bristol to Port Mahon, with leave to call at Gibraltar, and take in and discharge goods there; and with liberty to seek, join, and exchange convoy in the English and Irish Channels, with or without letters of marque. The words "on ship," were afterwards struck through with a pen, and the following memorandum was inserted in the margin of the policy, signed with initials of the underwriters: "The interest insured by this policy is declared to be on goods as interest may appear, including all charges incident to a loss, and to pay average on each package, as separately insured. London, 7th of December, 1812." The plaintiff was charterer of the ship. The ship had sailed from Bristol on the 19th of Nov. with a cargo to join convoy at Falmouth, but owing to bad weather was not able to make the latter port, and before she arrived at Gibraltar had sustained the damages which occasioned the average loss sought to be recovered in this action. Motion for a new trial, on the ground of the concealment of a material letter from the underwriters. This letter, which was dated the 6th of December, 1812, was written by the plaintiff to the broker who effected the policy, in answer to some inquiries made by the latter respecting the ship: it appeared by Lloyd's books that a ship called the *Sophia* of Bristol, had been seen at sea without convoy. The letter was to the following effect: "The *Sophia* you allude to is the vessel on which you effected the insurance, which ought to have been on goods. I did charter the brig (meaning the *Sophia*) and she was to have gone to Falmouth, as I understood, to join convoy; but I suppose the wind was contrary, and she could not fetch; but I know nothing about it myself." On showing cause against the rule upon the objection, that the letter above recited contained information which ought to have been communicated to the underwriters, it was contended that the vessel having been insured "with or without letter of marque," the plaintiffs had a right to consider her as a running ship, and that therefore it was not necessary that she should sail with convoy; but independently of that, the letter only stated that she had been at sea, not in distress or danger; she was therefore so far advanced on her voyage, and the risk, consequently, rather diminished than increased; and the conclusion of the letter, they said, proved that even this was only conjecture. The question therefore was whether the insured was bound to communicate every suspicion and surmise which might arise in his own mind. It was denied that the ship had a right to sail without convoy, and contended therefore, that her having been seen at sea without convoy was a material fact. It had been observed by Lord Mansfield, that in these cases *uberrima fides* should prevail; but in this case there appeared to have existed no faith at all. The Court being unanimously of opinion that this was a material fact, and ought to have been communicated, the rule was made absolute for a new trial.

13. *KIRBY v. SMITH*. T. T. 1818. K. B. 1 B. & A. 672.

A ship had sailed from Elsinour on her voyage home six hours before the owner, who followed in another vessel on the same day, and having met with rough weather on his passage arrived first, and then caused an insurance to be effected on his own ship. On the question whether these circumstances were material to be communicated to the underwriters,

* Where the insurance was on goods from B. to London, the suppression of a letter dated a fortnight back, and received the day before, stating that the captain would sail next day, and desiring that if the ship had not insured to insure as low as possible, was held material; see *Willis v. Gloyer*, 1 N. R. 14.

the circumstances show that a true knowledge of the fact was material to enable the underwriters to form a just estimate of the risk, *Per Cur.* This was a concealment of a material fact. The plaintiff knew that the Ocean had sailed before the other vessel, and that the latter had met with rough weather on her passage to England. The voyage it appears is sometimes completed in four or five days, and the average duration is from eight to ten days. Now the vessel which had arrived had been fourteen days on her passage. It is said that communication was made that the ship was all well at Elsineur on the 26th of July; but the natural conclusion from that representation would be, that she was left there well at the time, and which was contrary to the fact. Nor can the knowledge of the usual custom, as to the stay of vessels at Elsineur, raise a necessary presumption, that being there on the 26th of July, she must have also sailed from Elsineur on that day; for

Upon a policy her sailing would depend, of course, upon the weather, and upon her state of icy effected repair, both of which might cause considerable delay. The fact, therefore, itself, ought to have been stated to the underwriters.

14. CAMPBELL V. INNES. E. T. 1821. K. B. 4 B. & A. 423.

A policy was effected after the declaration of war by America, but before it was known in England, in which it was not stated in the policy, nor communicated to the underwriter, that the assured was an American subject; and the loss happened in consequence of a seizure by the American government for a forfeiture, for the breach of their non-importation act.

Per Cur. In this case, the policy did not show that the property belonged to an American subject, nor did it appear at the trial that the underwriter was acquainted with that fact. Now an American subject, to whom a ship and goods are consigned in America, if he knows that he is insured against a loss of this description, may not only omit to take proper means for preventing such loss, but may possibly facilitate it, by giving information to his own government upon the subject. We think that that is a risk which the underwriter ought to know before he subscribes the policy. In *Simeon v. Barrett* the underwriter was fully acquainted with all the circumstances, and it was distinctly in the contemplation of both parties there to insure against the act of the government of the assured. It was upon that ground that the underwriter was held to be liable. But in this case it does not appear that the underwriter knew the ship and goods to be American property. Now that makes a material difference in his risk; for if the property be British owned, of course the owner will do all in his power to prevent the risk from occurring; but if it be American owned, he may, if he be secure of payment by the underwriter, lend himself to the purposes of his own government, and assist them in obtaining possession of the property insured. As it does not therefore, appear distinctly that this was a risk within the contemplation of the underwriter, at the time he subscribed the policy, we think that the nonsuit was right.

act; held that the action could not be maintained even after the war had terminated.

15. HALL V. COOPER. M. T. 1811. K. B. 14. East, 479.

The fact that a ship insured at and from a certain place, where in fact she is not at the time, but arrives there after some interval, (but the fact is not communicated to the underwriters, who do not call for information on the subject), it is a question for the jury, whether the delay which intervened materially varied the risk? In a case where the insurance being effected on the 13th of August, in London, on goods at and from Heligoland to the Baltic, the vessel did not sail from the Thames till the 27th, to which was to be added the further time for her reaching Heligoland, the Court held it did not.

16. LONG V. DUFF. SAME V. BOLTON. T. T. 1800. C. P. 2 B. & P. 239.

The Lucy was a Spanish-built ship, purchased at Hamburg, by the plaintiff, a British subject; she was not registered, but had paid the alien duties. Previous to setting sail upon the voyage insured, the captain of the Lucy applied to the Admiralty for a license to proceed without convoy to Leghorn and Naples, but only obtained a license for Naples, notwithstanding which he proceeded on the voyage to Leghorn without convoy, and was captured off that place by a French privateer. The only difference between the two cases was, that in the former it was represented to the underwriters at the time of effect-

ing the policy that the Lucy was a foreign-built ship, and not registered, but foreign built, and in the latter it was not. On the part of the defendant it was objected in both actions, that as the license obtained did not extend to the voyage insured, and so entitled the Lucy, though a foreign-built ship British owned, was within the provisions of the 38 Geo. 3. c. 76. which makes void all policies upon ships sailing without convoy; and in the second that supposing her not to be within the provisions of the convoy-act, that circumstance ought to have been communicated to the underwriters. to sail with out convoy.

Per Cur. There was nothing to distinguish the case of *Long v. Duff* from *Long v. Boltuns*, except this single circumstance, viz. that in the latter it was not disclosed to the underwriters that the ship in question was of such a peculiar description, as not to fall within the provisions of the convoy act; with respect to which we are all of opinion that it was properly left to the jury to determine whether, according to usage, it was the duty of the assured to give this information, or of the underwriter to satisfy himself upon that point. [374] The jury have decided that it was the business of the underwriter to obtain this information for himself.

17. *FORT V. LEE.* H. T. 1811. C. P. 3 Taunt. 381.

A policy was effected in London the 24th of May, 1808, upon a ship on a policy at and from London to her port of discharge, lost or not lost. The ship sailed on the last day of April, which fact was not disclosed to the underwriters; and a broker, who was called, said, that if he had known of the ship's sailing, he should have thought it a circumstance material to be communicated, although he admitted, that if at the time of effecting the policy she had sailed only a week, he should have thought it immaterial. But the Court said, that if the underwriter had wanted to know whether the ship had sailed, he ought to have inquired, and unanimously refused the rule. Under a and from London, the fact that the ship has sailed need not unless demanded, be communicated.*

18. *FOLLEY V. MOLINE.* E. T. 1814. C. P. 1 Marsh, 117; S. C. 5 Taunt, 430.

It appeared that the plaintiff had written from Lismore, near Yaughall, on the 25th of October, 1810, to a Mr. Hyde, at Weymouth, to the following effect: "On receipt, you will please to order an insurance, should the vessel not arrive before you receive this letter. The vessel will sail this evening or to-morrow." Mr. Hyde received this letter on the 1st of November, and the 2nd he wrote to Messrs. Olive and Britten, in London, to effect the insurance, without sending them a copy of the plaintiff's letter, or communicating the contents of it to them. The policy was effected on the 3rd of November; the ship had sailed on the 25th of October, and on the 28th was off Weymouth, when she was driven by stress of weather upon the French coast, and was there stranded and captured. It was for the defendant objected, that the plaintiff's letter to Hyde ought to have been communicated to the underwriters, and he cited *Willes v. Glover*, 1 N. R. 14; where, on a policy on goods from Berderyggne to London, effected by the consignees on the 13th of December, without communicating a letter received by them the day before, dated the 30th of November, informing them that the ship would sail the next day, and directing them, if she should not be arrived, to effect the insurance as low as possible, the Court held that this was a material concealment, though the ship did not in fact sail till the 24th December. The Chief Justice, however, said that that was the case of a missing ship; but in the present case it was proved that the usual time for performing the voyage in question was eight or ten days; and as the time which had elapsed between the day when the ship was expected to sail, and in fact did sail, and that on which the policy was effected was only nine days, his lordship held that she was not to be considered as a missing ship, and therefore directed a verdict for the plaintiff. The time of a ship's sailing is not, in general, a circumstance necessary to be communicated to the underwriters, except in the case of a missing ship.

Lord Chief Justice Gibbs. I was of opinion at the trial, that if the ship were out of time, the letter should have been communicated, but not other-

* Not communicating the fact that two vessels which left much about the time as the one insured was expected to leave, had arrived, but which were considered faster sailers, held immaterial; see *Littledale v. Dixon*, 1 N. R. 151.

wise. The letter came by a different conveyance from the ship, for it came partly by land; it was a chance, therefore, which would arrive first. Circumstances may make it necessary to communicate the time of a ship's sailing, but I saw none in this case.

Mr. Justice Heath. We cannot say, as a general rule, that the time of a ship's sailing is a necessary circumstance to be communicated.

Facts &
against sea
worthiness
need not be
communicat-
ed.

19. HAYWOOD v. RODGERA. H. T. 1804. K. B. 4 East, 590.

In an action, a policy of insurance upon a ship from Trinidad to London, it appeared that the assured had received a letter from his captain informing him that he had been obliged to have a survey on the ship at Trinidad on account of her bad character; but the survey which accompanied the letter, gave the ship a good character; it was holden, that the concealment of the letter and survey from the underwriter did not vacate the policy, inasmuch as the assured impliedly warranted the ship to be seaworthy, and it did not appear that he had concealed any circumstance relative to the seaworthiness of the ship, or that at the time of effecting the policy he knew of any fact which rendered her with reference to the risk, otherwise than seaworthy.

20. MEYNE v. WALTER. E. T. 1800. K. B. 1 Park. Ins. 263.

By a
French ed-
dict all ves-
sels having an
English su-
percargo
were to be
condemned;
an insur-
ance was effect-
ed on a
Portuguese
ship so cir-
cumstanc-
ed; held on
a loss by
capture and
condemna-
tion on that
ground,
that there

Action on a policy of insurance on a Portuguese ship at and from Madeira to her port of discharge in Jamaica, with liberty to touch at the Leeward Islands; the defendant underwrote 150*l.* upon it; the ship was captured by a French privateer, and condemned in the Court of Admiralty in France, on the ground of having an English supercargo on board. The action was brought to recover the loss from the underwriter, who refused to pay, alleging that the plaintiff should have disclosed to him that the supercargo was English. At the trial, a verdict was given for the plaintiff. Upon a case reserved for the opinion of the Court, and containing in substance the facts just stated for the defendant, it was insisted upon the argument that the agent for the insured ought to have disclosed this fact, and that it was the more material in this case, because during the present war, an ordinance passed in France, similar to one made in the last war in 1756, which declares that no Dutch ship shall be allowed to take on board a supercargo belonging to any nation at enmity with the court of France; and that if any ship having such supercargo be taken it shall be condemned as lawful prize.

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fraudulent
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ment to ex-
onerate the
underwri-
ter.

Lord Mansfield. It is an oppressive and arbitrary rule, and contrary to the law of nations. If both parties were ignorant of it, the underwriter must run all risks; and if the defendant knew of such an edict, it was his duty to inquire if such a supercargo were on board. It must be a fraudulent concealment of circumstances that will vitiate a policy; but it is remarkable that neither party has said a word respecting the treaties between France and Portugal.—Judgment was accordingly given for the plaintiff.

21. WEBSTER v. FOSTER. M. T. 1795. N. P. 1 Esp. 407.

When a ves-
sel has been
a long time
at sea, it is
a fraudu-
lent con-
cealment if
that circum-
stance be
not commu-
nicated to
the under-
writer, or to
the broker
employed.

Action on a policy of insurance. The ship was then at Belfast, in Ireland. She was assured from thence, after effecting the policy, and sailed from Liverpool, on the 7th September, and was captured on the 19th of the same month. It was stated, that being in London on the 13th of October following, and not being under-insured, the plaintiffs had written to their correspondence in Hull, to effect a further insurance; that in consequence of a correspondence between them and their correspondent there, who at first declined effecting the insurance, on account of the premium being much advanced, the policy was not effected till the 23rd of that month; it was also stated by them that the master of the *Caroline*, though captured on the 19th, had been carried into North Bergen, and that they had not heard from him till the 30th of October. The broker who effected this insurance was called, and he stated that in answer to the inquiries of the defendant and the other underwriters respecting the sailing of the ship, he had answered that he knew nothing about her, having received no information on the subject from the plaintiff.

Lord Kenyon then observed that there was another circumstance which appeared to him to be decisive against the policy, which was, that though the

vessel had sailed near six weeks before the plaintiffs gave instructions for the policy, they had not communicated this circumstance to the broker, but had been completely silent on the subject; that the circumstance of their being then in London when the policy was effected was remarkable, for they had not attempted to effect the policy in London, where the circumstance might probably be inquired into, but had chosen to give orders, by letter, to have the policy done at Hull, and cautiously avoided saying any thing as to the sailing of the vessel; that was an attempt at evasion, and a concealment of circumstances sufficient to avoid the policy.

22. *ANDREW V. BALL*. T. T. 1795. N. P. 1 Esp. 273. S. P. *FREERE V. WOODHOUSE*. E. T. 1820. N. P. Holt, 572.

In an action on a policy of insurance of a ship on a voyage from Lisbon to London, it appeared that the plaintiff had, on the 24th of November, received information of the ship having sailed on the 8th. It appeared also that another vessel, which had sailed at the time with the ship insured, had arrived in safety, after which, viz. on the 2nd of December, the plaintiff had effected the insurance in question, without making any disclosure to the underwriter; it was holden that there was a concealment of circumstances sufficient to avoid the policy.

23. *RATCLIFFE V. SHOOLERED*. T. T. 1789. K. B. Park, 249; S. C. 1 Marsh, 466.

An action was brought on a policy of insurance on goods on board the *Maty and Betty* at and from the coast of Africa, to her last discharging port in the British West Indies. The objection made to paying the loss was, that there had been a material concealment or misrepresentation of the true state or situation of the ship and voyage at the time of underwriting the policy. The ship had been sent out to trade on the coast of Africa, with directions to proceed from thence to the British West Indies, to stop at Barbadoes, if she could get a sale; if not, to proceed to Montego Bay. On the 2nd of October, she sailed from St. Thomas's, on the coast of Africa, with a cargo of slaves, and was taken on the 6th of December following, by an American privateer. A letter was received by a house at Liverpool, on the 21st of February, mentioning that the ship was well, and had sailed from St. Thomas's, on the 2d of October. This information was communicated next day to the plaintiffs, who in consequence of it, wrote the same evening to two different brokers to get a new insurance on the ship, there having been one before, and another on the cargo, which last was the subject of the present action. In the instructions to the brokers the plaintiffs say nothing of the ship from the time of her first sailing; but to one of the brokers they wrote thus: "We should be glad if you would get us 600*l.* more on the ship, as she is rather long, and we think it not prudent to run so large a risk at so critical a time; we expect to hear soon of her." It had afterwards occurred that the policy might be affected if intimation was not given of the letter which had been received; the broker, therefore, by direction of the plaintiffs, added to the instructions "the above ship was on the coast the 2nd of October," but said nothing of her having sailed from St. Thomas's. The policy was dated the 21st of March.

Lord Mansfield. The insured is bound to represent to the underwriter all the material circumstances of the ship and voyage; if he did not, though by accident only or neglect, the underwriters are not liable, *a fortiori*, if he suppress or misrepresent from fraud. The question is, whether this is one of those cases which is affected by misrepresentation or concealment? If the plaintiffs concealed any material part of the information they received it as a fraud, and the insurers are not liable. The jury found for the defendant, agreeably to his lordship's direction.

24. *DA COSTA V. EDMUND*. T. T. 1815. K. B. 2 Chit. Rep. 227; S. C. 4 Campb. 142.

Motion to set aside a verdict for the plaintiff, and enter a nonsuit. On a point reserved in an action on a policy of insurance on casks of oil of vitriol stowed on deck fore and aft, it was contended that it was necessary to commu-

If it appear that a plaintiff did not intend to insure until he believed her to be missing, and then not until another ship which had sailed at the same time had arrived in safety, the concealment of the fact is fatal.

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Where the insured knew that his ship had sailed from the coast of Africa on a certain day and only stated that she was on the coast on that day held that it was a material concealment, and vitiated the policy.

Underwriters are not entitled to notice of the part of a ship

where goods are stowed, whether on deck or otherwise.

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nicate to the underwriters that they would be stowed on deck, and that there was another method of stowing, to place them in a place parted off by the bulkhead and sunk in sand. There was an express agreement with the captain that he should stow them on deck. Sometimes they are put in the boat on the deck, in sand; when stowed on the deck less freight is paid. It was proved that in other cases, the place where the commodity is to be stowed on deck is mentioned to the underwriters, and policies were produced to show that the place of stowage was mentioned in the policy on such goods.

Lord Ellenborough, C. J. Only one of the policies was so before the policy in question.

Bayley, J. There was no evidence that it was the usage of the trade.

Ellenborough, C. J. Evidence was necessary that they should be stowed safely; *Haywood v. Rogers*, 14 East. I left it to the jury that it is not necessary to communicate this; for, if it were, it would then, in all cases, be necessary to communicate the mode of stowing.

The counsel observed, that in this case there was a directly different mode of stowing.

Le Blanc, J. Of course they were lashed on board?

Ellenborough, C. J. Difference, perhaps, in all places in a ship, some better, but not necessary to enter into the history of every nook and corner; this, in effecting a policy, would be impossible. Rule refused.

25. STEWART v. BELL. M. T. 1821. K. B. 5 B. & A. 238.

Where an insurance was effected on goods from London to Jamaica generally, the goods being destined for a particular place in the island, and the usual course in such a case was for the ship to proceed to an adjoining port, and there transship the cargo into shallops, but no information of the cargo was given to the underwriters, they were never the less held liable for a loss which happened after the transshipment on board the shallops.

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So, in an action on a policy at and from Oporto to London, it was held that the underwriters

Insurance from London to Jamaica generally. The goods insured were destined to a particular port in the island; and the usual course in such cases was for the ship to proceed to an adjoining port and there to transship the cargo into shallops; but no information of this was given to the underwriters. In moving for a new trial, the counsel referred to the case of *Ferguson v. Allen*, tried before Lord Ellenborough, at Guildhall, sitting after Hilary term, 1806, as in point. There the insurance was on goods by the ship *Phoenix*, at and from London to Tobago, and the goods were intended for Castura Bay, in that island; but Castura Bay not being safe in war time or for a ship of the size of the *Phoenix*, she went to Courland Bay, and sent the goods by a drogher, which was captured; there the underwriters were held not liable for the loss; that case is very similar to the present. The circumstance of the goods being transhipped makes a considerable difference in the risk. No doubt, if the goods had been landed at port Morant the underwriters would have been liable for any loss by boats; besides, the risk in droghers, when intended to be borne by the underwriters, is specially mentioned in the policy.

Per Cur. The assured must show that the port to which the ship proceeds is the usual port for goods destined to that particular place; that was so here, for port Morant was the place to which the ships of the burden and draught of water of the *Nesbitt* usually proceeded with goods destined for Plantain Garden, River Bay. The underwriter is presumed to be acquainted with the usual course of the voyage, and to take a premium for the risk accordingly; the policy is to cover the goods till they are landed, and the underwriter should inquire, therefore, what is the usual mode of landing the goods insured. Here it appears to have been the usage to tranship the goods into shallops; the words "including risk in droghers" have probably been added to policies for greater security; but where it is the usage of the trade and in the ordinary course of the voyage to tranship into droghers, the underwriters are liable, even though those words are not found in the policy. Rule refused.

26. KINGSTON v. KNIBBS. M. T. 1808. N. P. 1 Campb. 508.

Action on policy on ship at and from Oporto to London. The ship having taken in a part of her cargo within the bar of Oporto, went outside to take in the remainder, when she was driven out to sea in a gale of wind and captured. The defence was, that the underwriters had not been informed she was to take in any part of her cargo outside the bar. But several witnesses stated that it is usual for vessels to do so at Oporto, when, from the state of the river, they cannot conveniently load entirely within the bar. And

though it appeared that, it in policies at and from Oporto, liberty is sometimes expressly given to load on either side the bar, Lord Ellenborough held that the underwriters were bound of themselves to take note of the usage, and the plaintiff had a verdict.

27. *PLANCHE v. FLETCHER*. M. T. 1779. K. B. 1 Doug. 251.

The plaintiffs, Planche and Jacquery, merchants in London, insured goods on board the Swedish ship called the *Maria Magdalen*, lost or not lost, at and from London and Ramsgate Nantz, with liberty to call at Ostend, being a general ship in the port of London for Nantz. There was a declaration in the policy, that the insurance was made on account of certain persons carrying on trade under the name and firm of Vallie and Du Plessis. *Monsieur Lusseau, le jeune, Guillaume Albert, et Poitier de la Gueule*, the defendant, underwrote the policy for 300*l*. at three guineas per cent. The ship's clearances from the Custom House in London, and her other papers, were all made out as for Ostend only, but the ship and goods were intended to go directly from London to Nantz, without going to Ostend. Bills of lading in the French language, dated the 18th of July, 1778, were signed by the captain in London, but purporting to be made at Ostend, and the goods were shipped there to be delivered at Nantz. The policy was subscribed by the defendant on the 7th of July, and the lading was taken in between the 24th of July and the 17th of August; the proclamation for making reprisals on French ships, &c. bore date the 29th, and appeared in the Gazette on the 31st of July. Two underwriters had signed the policy after the proclamation at the same premium of three guineas, one on the 31st of July, and the other on the 7th of August. The ship sailed on the 24th of August, and was taken by a King's cutter on her way to Nantz. After her departure from Gravesend, the captain threw overboard all the papers he had received from the Custom House officers at Gravesend, and which were no longer of any use. The ship was released by the Admiralty, but the goods were condemned. The plaintiff had no connexion or share in the ship. The grounds of the application for a new trial were two: 1. That there was no fraud on the underwriters, the ship having been cleared out for Ostend, and yet never having been designed for that place. 2. That as hostilities were declared after the policy was signed and before the ship sailed, the defendant ought to have had notice, that he might have exercised discretion, whether he would choose for a peace premium to run the risk of capture.

Lord Mansfield. The verdict is impeached upon two grounds: 1. It is said there was a fraud on the underwriters in clearing out the ship for Ostend when she never was intended to go thither. But I think there was no fraud on them, perhaps not on any body; what has been practiced in this case was proved to be the constant course of the trade, and notoriously so to every body. The reason for clearing for Ostend, and signing bills of lading as from thence, did not fully appear, but it was guessed at. The *fermiers généraux* have the management of the taxes in France. As we have laid a large duty on French goods, the French may have done the same on ours, and it may be the interest of the farmers to connive at the importation of English commodities, and take Ostend duties rather than stop the trade by exacting a tax which amounts to a prohibition. But at any rate this was no fraud in this country; one nation does not take notice of the revenue laws of another; with regard to the evasion of the lighthouse duties, the ship was not liable to confiscation on that account. The second objection is, that the policy was made before, and the ship sailed after, the proclamation for reprisals. But every man in England and France on the 17th of July, expected the immediate commencement of war. I will not say it was actually commenced, but the ambassadors of both countries were recalled; the *Pallas* and *Licorne* were taken by the fleet at sea, and as it appeared afterwards waiting for each other to fight. It does not appear that the goods were French property, and an Englishman might be sending his goods to France in a neutral ship; but it is indifferent whether they were English or French. The risk insured extends to all

If an insurance is made before the commencement of hostilities, but when a war is generally expected, the insured is not bound to give the underwriters notice, though the ship do not sail till after the war is begun.

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A policy on captures; see 1 B. & P. 191; 4 East, 326; and as other underwriters signed at the same premium after the proclamation, it appears that the war-risk was vitiated by in view when the defendant signed. Shall he avail himself of an event which the non increases the risk, but which he had in contemplation when he underwrote the communication to the policy? I am of opinion that there should not be a new trial.

28. *BOYD v. DUBOIS*. M. T. 1811. N. P. 3 Campb. 133.

The plaintiff's witnesses stated, that while the ship was lying at a place near Torbay, a fire broke out in the hold during the night, which consumed the greatest part of the cargo, but the origin of which could not be discovered. The defendant's counsel undertook to prove that the hemp was damaged; that for this reason it was apt to ferment and take fire; that its condition had not been communicated to the underwriters; and that the fire actually had originated in the hemp itself. And they contended that, even if the last circumstance should not be satisfactorily made out, the underwriters would be discharged by the damaged state of the hemp not being communicated to them, since, had they been aware of that, they would have refused to subscribe to the policy.

Lord Ellenbrough. If the hemp was put on board in a state liable to effervesce, and it did effervesce and generate the fire which consumed it, upon the common principles of insurance law, the assured cannot recover for a loss which he himself has occasioned. But I most positively say, that they were not bound to represent to the underwriters the state of the goods. It would introduce endless confusion and perpetual controversies if such a duty were to be imposed upon the assured.

29. *HAYWOOD v. RODGER*. H. T. 1804. K. B. 1 Smith. 289; S. C. 4 East, 590.

In an action on a policy of insurance upon a ship from Trinidad to London, it appeared that the assured had received a letter from his captain, informing him that he had been obliged to have a survey of the ship at Trinidad, on account of her bad character, but the survey which accompanied the letter gave with the ship a good character. It was holden that the concealment of the letter and survey from the underwriters did not vacate the policy, inasmuch as the insured impliedly warranted the ship to be seaworthy, and it did not appear that he had concealed any circumstance relative to the seaworthiness of the ship, or that at the time of effecting the policy he knew of any fact which rendered her, with reference to the risk, otherwise than seaworthy. The ship had been surveyed at T. on account of her bad character, and found sufficient on a survey, although the ship's general bad character would have enhanced the premium, and the survey would not have satisfied the underwriters.

(S) RELATIVE TO THE SHIP BEING DULY DOCUMENTED.*

1. *CARRUTHERS v. GRAY*. H. T. 1812. K. B. 15 East, 35.

A declaration on a policy on goods. It was averred that the ship, with the goods on board, when at C. was arrested by the persons exercising the powers of government there, and the goods were by the said persons seized and confiscated. It was proved that on the ship's arrival at C. her hatches were sealed down, and her cargo was afterwards forcibly unloaded by the officers of government, and never delivered to the consignees. This was holden to be sufficient proof of the averment, without the production of any sentence of condemnation.

2. *BELL v. CARSTAIRS*. T. T. 1811. K. B. 14 East, 394.

In the case of an insurance upon ship's goods and freight, all belonging to nearly the same American proprietors, which as it appears by the sentence, had been condemned on account of the common default of all the proprietors in their just character of shipowners, in not having a regular passport on board, as required by the treaty of their state with France, it was holden that the assured could not claim from the underwriter an indemnity for a loss thus occasioned by themselves, although the ship was not warranted or represented to

* In all contracts of insurance on a ship there is an implied undertaking that the ship shall be properly documented according to the national character. Hence, underwriters are not liable if a loss happen from the default of the insured in being unprovided with the documents which are required by the general law of nations or by particular treaties.

There is no implied warranty on the part of the owner of goods insured that the ship shall be in all respects properly documented; But where the same person insures both ship and goods, the underwriters will not be liable for a

be an American; for the shipowner is bound to have such documents as are [382] required by treaties with particular nations on board, to evince his neutrality loss which may hap-
in respect to such nations. pen to either subject insurance from the want of proper documentation.

3. *HEEL v. LACY*. M. T. 1810. C. P. 3 Taunt. 285.

The vessel insured had come from New York to London with a cargo of pitch, tar, and other naval stores; from hence she was chartered from London to Riga and back, and sailed on the voyage under a British license; while she was lying about two miles from the castle of Elsinour, she was boarded by a privateer, which carried her into a Danish port; she was libelled in the prize court of Zealand as prize, and condemned; the sentence of the Court was as follows: "In this present case, against George Thomas, who together with the ship *Pennsylvania*, whereof he was master, has been brought to this place on his voyage from London, it has been ascertained that the ship *Pennsylvania* is not provided with any sea passport; whereof Captain Thomas has alleged as the reason, that the passport granted him from his home station at New York was styled for a fixed voyage from New York to Madeira; in consequence whereof the North American consul at London had kept this passport, signifying, according to the nature of the passport, it was indifferent whether he had it or not; besides he has exhibited in the court a certificate from the North American consul at London, purporting that amongst several papers he has deposited his sea passport with the said consul. Now, as the reason alleged of the want of a passport is insignificant, because Captain Thomas ought not to have undertaken other or more voyages than such whereto he was authorised by his government; this want is also, agreeably to the regulation for privateers, and the lawful adjudication of prizes of the 14th Sept. 1807, 1808, 1809, letter C., a reason of condemnation; and the Court has no convenient reason at all to deviate from this severity respecting the circumstances of the case in *concreto*, being all against the captain. Thus, four men of the crew have unanimously declared that two days previous to the seizures, in order to persuade them at Elsinour to assert that they came from Bergen, he had replied to their objections in this behalf, that he was provided with clearings from Bergen, and that he had a journal conceived in such a manner as to make it appear that he came from Bergen; the remaining people of his crew, not confessing to have heard any such thing, had nevertheless not found it seasonable to deny that at the time mentioned by the said four witnesses, he had several of the people collected in their proof, and the captain, who denies to be or to have been provided with clearings from Bergen, &c. has notwithstanding confessed that he hath ordered the people to say that the ship came from Bergen. Likewise it is ascertained, that when the captain came on board he told them that he came from Bergen, and that he did not change this declaration previous to his appearing in Court. A witness, yet of no unquestionable credibility, has constantly persevered in saying that after the seizure papers had been burnt on board; besides considerable wants exist amongst Captain Thomas's papers, as for instance, that his journal does not at all proceed from the time when he left ultimately his pretended home, but begins at a voyage from Guadaloupe; though he relates, that previous to that time he had sailed from New York to Madeira, and from thence to Guadaloupe, he is not provided with any muster-roll and the agreement in writing for the wages made between the master and the crew at London is not attested by the North American consul of the said place, whereby it might appear that it was with this officer's knowledge that he undertook the voyage; further there has been found among his papers a letter, having all the characters of being fictitious and fabricated, for the purpose of making it probable that it is for account of the ship's pretended owner he is to sail for Riga, in order there to purchase a return cargo. We are of opinion that the afore-mentioned partly decisive and

However there is an implication that a neutral ship, represented to be such, shall be properly documented to prove her neutrality, though thereby she would be exposed to confiscation.*

* The underwrites is liable to an assured on goods on board of a neutral ship condemned for the want of documents necessary to entitle it to the privileges of its national character, provided there is no warranty of such character, and that the assured is not owner of the vessel; see *Bell v. Carstairs*, 14 East, 274; *S. P. Nonnen v. Kettlewell*, 16 East, 126.

partly suspicious data, are sufficient to decide the fate of the ship *Pennsylvania*, and that it is needless to enumerate the several other suspicious circumstances which aggravate the same. Wherefore the sentence proceeded to condemn the vessel as prize." From this sentence the captain appealed to the High Court of Admiralty at Copenhagen, which confirmed the decree in the following terms: "It is in confession that the ship pretended to be North American property, hath no sea passport; in which respect Captain Thomas hath reported that his passport was styled for a voyage from New York to Madeira, and that the American consul at London had retained the same, it being of no avail, as to the nature of the passport, whether the defendant had it or not. Hence it follows, that even if Captain Thomas has been in possession of such a passport, he hath at least undertaken other voyages than those which he was authorised by his government, on which the passport so delivered could not protect his. This circumstance must, *in casu*, be so much the more binding against him as the other circumstances of the cause are likewise against him. Out of his ship's crew four men have witnessed that Captain Thomas had ordered them to say that the ship came from Bergen; besides he declared himself that he had papers along with him, purporting that he was cleared out from the said place. This circumstance is corroborated thereby,—that Captain Thomas has confessed to have ordered them to say that he came from Bergen, which also he declared to the captors at their arrival at the ship, though he came from England; to this must be added that the ship's journal or log-book is not commenced from North America, and that she has not been provided with any muster-roll delivered or attested by an American officer; on account whereof, and of the regulations for prizes, the sentence of the prize court, as to the ship's condemnation, ought to be confirmed." The evidence of Thomas, the master, who was gone out of this country, was read from the judge's notes of what he had sworn on the former trial. He deposed that the ship was an American; that he had all regular documents on board, but that he believed they were all left in Denmark; that he had a sea passport and a British license, but that he produced neither to the court at Elsinour; he did not produce the passport, because it would have shown that he came from New York to England with naval stores. It was not usual for vessels to take a passport to go up the Baltic: he had told the master of the privateer that he came from Bergen, but he did not produce clearance from Bergen; he had such on board. He had kept the charter-party, and the sea passport. The American consul, being examined, swore that when the ship sailed from England, he must have been satisfied the due papers were in his office. The first underwriter on the policy swore that he did not know whether at the time of the ship's sailing in June, 1808, for Riga, it was necessary for a ship to have simulated papers; but that at present it was quite necessary. Several brokers and other witnesses proved that since the Berlin decree, the date of which was November 24, 1806, a ship could not safely proceed to the Baltic without simulated papers; that no policy could now be underwritten, without liberty to carry simulated papers; that some underwriters had refused to subscribe policies because the simulated papers were not well arranged; that no ship could sail to Russia without simulated papers; but that some policies on that voyage did, and others did not, contain an expression of the liberty to use them. The defendant, as before, contended upon this evidence, that the ship was not properly documented as an American, and was therefore not seaworthy. Another ground of defence which he took was that she had carried simulated papers without permission. Mansfield, C. J. put a question to the jury, whether a ship could not sail to the Baltic without simulated papers, and they gave it as their opinion that since the Berlin decree she could not. The jury again found a verdict for the plaintiff. On motion to set aside the verdict, and enter a nonsuit, the Court made the rule absolute.

A register is not a document required by the law of nations as expressive of a ship's national character.

4. *LE CHERMINT. v. PEARSON*. E. T. 1812. C. P. 4 Taunt. 367.

Per Cur. A register is not a document required by the law of nations, as expressive of a ship's national character.

5. *CARRUTHERS v. GRAY*. H. T. 1812. K. B. 3 Campb. 143; S. C. 15 East, 35.

After the ship was laden for the voyage by Oppenheimer, and the captain, Nor does who was also owner of the ship, had obtained his manifest and clearances at an accident the Custom-house, sixteen bales of goods belonging to the assured were put on board by the packer of goods, who had made all the entries necessary at the Custom-house. It was thereupon objected that the captain should have made a second clearance, the sixteen bales not being comprised in his manifest, nor part of the manifest of the captain's goods, on in the contract delivered by him. The plaintiffs, however, obtained a verdict, an exportation from this country, vitiate a policy on the ship. which it was now moved to set aside, on the ground that the requisitions of the loss did not happen on this account, the assurance was vacated, it being a condition implied in every policy that the ship should be documented and cleared out according to law. It was admitted that there was no ground for imputing fraud to the assured, but contended that the provisions of the act had not been pursued. The third section enacts, "that no captain of any vessel shall take on board any English goods to be exported, until he shall have entered such ship in the book of the commissioners, customer, or collector, and comptroller outwards of such port where he shall take in goods, together with the name of such captain, the burden of such ship, the number of guns, and to what port she intends to sail, and before he shall depart with such ship out of such port, shall bring unto the said person who shall be appointed for managing the customs, the customer, or collector, and comptroller of such port, a contract in writing under his hand of the names of every merchant, and other person or persons, that shall have laden and put on board any such ship such goods, together with the marks and numbers of such goods; and shall likewise, publicly, in the open Custom-house, upon his oath, to the best of his knowledge, have answered to such questions as shall be demanded of him concerning the same." It is not enough, therefore, under this clause, that the agent for the freighter has made the entries, unless the captain has also made them before he sails. The omission to do so makes the ship liable to seizure, and so increases the risk of the underwriter; and although the loss may not have arisen on that account, it will not make any difference; 7 Term. Rep. 160. If the owner of the ship was to do an act, the omission of which alters the risk of the underwriter, that will avoid the policy; and if it is the same where the assurance is upon goods. [385]

Lord Ellenborough, C. J. Can you show by the statute that the ship is seizable? By the stat. 12 Geo. 1. c. 28 s. 17. the officer, after entry of the goods (mentioned in that clause), may search the bales, and if the goods be not rightly entered, may seize them, and the same are forfeited.

Bayley, J. Have you any case to show that there is an implied warranty on the part of the assured on goods that the ship shall be properly cleared out?

There is no case to the effect; but there is no case which makes a distinction in that respect between the assured on ship and the assured on goods.

Lord Ellenborough, C. J. It not only appeared on the part of the assured that there was no fraud, but also no negligence. The sixteen bales were included in one of the papers which was on board; the cocket was on board.

6. *HORNEYER v. LUSHINGTON*. H. T. 1812. K. B. 15 East, 46; S. C. 3 Campb. 85. S. P. FLINDT v. SCOTT. H. T. 1818. 5 Taunt. 692.

The goods insured were laden on board the ship in the port of London. She sailed with a licence, and took on board simulated papers, representing that she came from Berghen, in Norway. Sweden being then at war with Russia, she arrived at Gottenburgh, from whence, after receiving orders, she proceeded to and arrived at Riga, where her papers were taken, and her hatches immediately sealed down by the government officers, until her papers could be sent to St. Petersburg to be examined; and on such examination orders were immediately sent to Riga to seize the ship and cargo, which was done, and she was afterwards condemned with her cargo, on the ground of having simulated papers on board. This, Lord Ellenborough held, was not a mooring As the carrying of simulated papers is a wrongful act, and a cause of condemnation, therefore, where a ship carried simulated

[386] twenty-four hours in safety, there having been an incipient seizure immediately on her arrival, which ended in her condemnation.

On motion for a new trial, Lord Ellenborough, C. J. said: I do not pronounce whether the carrying of simulated papers was or was not an enhancement of the risk insured; but my opinion is founded on the effect of the sentence of condemnation, which has proceeded upon the mere personal act of the assured in carrying such papers, which it treats as a crime, and which act is thereby proved to have been the efficient cause of the loss, the very ground of the condemnation. How then can the underwriter be answerable for a loss which happened from an act of the assured done without his leave?" The other judges concurred with his lordship in this opinion. When this question was first agitated, I had a difficulty in putting the construction which is now contended for, as words which I verily believe have a different construction in the commercial understanding of those who used them. However, the Court came to a decision on the point in the case of *Robertson v. French*; and this question now comes before us after the case of *Spetta v. Woodman*. It is, therefore, no longer to be doubted what construction is to be put upon these words. It is to be considered also, in aid of such construction, that the goods may have been damaged in their transit from London to Gottenburgh, which might cast upon the underwriters a damage occurring anterior to the commencement of the risk. It seems to me, therefore, that under the terms of this policy the risk upon the goods never commenced, and there must be, therefore, a proportional return of the premium.

7. *OSWELL V. VIGNE.* H. T. 1812. K. B. 15 East, 70.

Nor can the insured recover for a loss by capture, if it appear by the sentence of a foreign prize court that the carrying of simulated papers was one of the grounds of condemnation.

In an action on a policy of insurance it appeared that Famin was a Russian subject; that the ship sailed with a licence on a voyage insured from London to Peterburgh; and after touching at Gottenburgh, was captured by a Danish privateer, carried into Alborg, and condemned as prize to the captors, which sentence of condemnation was afterwards, on appeal, confirmed by the Court of Admiralty at Copenhagen. Extracts of the sentences of condemnation and confirmation were put in, and were as follows: "June 24, 1810. Sentence of condemnation in the case No. 7. The privateer, Jorgen Neilson, plaintiff, and Captain George Weyer, ship *Wassila*, defendant. Under the present case, it has been confessed by the captain and crew of the brig *Wassila*, brought to Alborg by the privateer, Jorgen Neilson, that the ship coming from London has made use of an English convoy thence to Gottenburgh, and formerly from Cronstadt through the Belt; by reason thereof, and as the ship's papers are besides not in due order, there cannot, without any further examination, be the least doubt, but that the ship, together with that part of the cargo she had in at the capture, must be adjudged to the privateer, who made the prize at a lawful place, and has been supplied with a letter of marque. Sentence of confirmation, 2nd December, 1810. Though the nationality of the ship *Wassila*, as Russian, were perfectly cleared up, still it has been evidently proved that it has been forfeited by the conduct of the plaintiff; (the agent of Famin at Copenhagen) and the captain on this voyage. It has been confessed by Captain George Weyer and his whole crew, and the plaintiff himself has acknowledged, that the vessel went last year through the Belt, under English convoy, with a cargo, bound to London, which was also unloaded there. Afterwards the vessel went from London to Gottenburgh, under convoy, and was to follow the same for the future; but she had not got ready soon enough; that the captain on the voyage has used a simulated clearance, has had false papers, and has kept a false journal. These are the usual means whereby to conceal a smuggling trade with the enemy. Thus it is plain that this vessel is, according to the regulation for captors, liable to condemnation." And it concluded by decreeing that the sentence of the Prize Court should remain in force. Under these circumstances it was contended at the trial, on behalf of the defendant, that the carrying simulated papers, not being within the terms of the policy, and being the ground of the condemnation of the ship, the plaintiffs were not entitled to recover for a loss of

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which they were the efficient cause. But a verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Per Cur. The question then is, if the carrying them were one of the causes of her condemnation? If it were, it was a risk to which the underwriter has been exposed without his consent. In *Denison v. Modigliani*, the taking of the letters of marque only indicated an intention to use them, which, if the assured had afterwards done, that might have been a deviation, and discharged the underwriter; inasmuch as the party was not warranted to enter into a hostile speculation, under an insurance intended to protect a mercantile adventure. But that intention was not carried into effect; and, therefore, the principles on which that case was decided were, in the subsequent case of *Moss v. Byrom*, considered as new, and going to the extreme verge, and it has not since been acted upon. The question, however, here, is, whether the simulated papers were not a co-efficient cause of condemnation? In order to ascertain that, we must look to the sentence. It commences "Though the nationality of the ship *Wassila* as Russian were perfectly cleared up, still it has been evidently proved that it has been forfeited, by the conduct of the captain on this voyage. It has been confessed by the captain and his whole crew, that the vessel went last year through the Belt, under English convoy, with a cargo bound to London, which was also unloaded there afterwards the vessel went from London to Gottenburgh, under convoy, and was to follow the same for the future, but did not get ready soon enough." It then seems to take up a new stage of proceeding applicable to this voyage. "The captain on the voyage has used a simulated clearance, has had false papers, and kept a false journal. These are the usual means whereby to conceal a smuggling trade with the enemy. Thus it is plain that this vessel is, according to the regulations for captors, liable to condemnation." Why does the sentence use the term "thus," except as referring to what has been before stated, viz. the having a simulated clearance and false papers? Can any one doubt, after reading the sentence, that this is at least one of the efficient causes of condemnation? I cannot say that it did not make a main ingredient in the cause of condemnation; and if so, it has induced a forfeiture brought on by the act of the assured themselves. As long as the comity of nations is allowed to stand, and to regard these condemnations as final, and not as *res inter alios acta*, it seems to us that, looking at this sentence as our guide, we must consider the carrying simulated papers as one of the grounds of forfeiture.

S. *RICH V. PARKER*. T. T. 1798. K. B. 7 T. R. 705.

The ship, the *Atlantic*, was an American ship, and the property of the plaintiff, a native citizen of the United States of America, and that the goods were American property. The verdict set forth the treaty between France and the United States of America in 1778, in which it was agreed (*inter alia*) that the ships and vessels belonging to the subjects of the other ally must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the ship; that it might thereby appear that the ship really and truly belonged to the subjects of one of the parties, which passport should be made out and granted according to the form annexed. And it was further agreed, that if the ships of the subjects of either of the parties should be met with, either sailing along the coast or on the high seas, by any ships of war of the other, or by any privateers, the ship of war or privateers, for the avoiding of any disorder, should remain out of cannon shot, and might send their boats on board the merchant ship which they should so meet with, and might enter her to the number of two or three men only, to whom the master or commander of such ship or vessel should exhibit his passport, concerning the property of the ship, made out according to the form inserted in that treaty; and that the ship, when she should have shown such passport, should be free and at liberty to pursue her voyage, so as it should not be lawful to molest or search her in any manner, or to give her chase, or to force her to quit

Where an express warranty is given, it covers the voyage from its commencement, and if the ship be not properly documented at the time of sailing, the underwriters will be discharged, although the loss happen from another cause; but when the obligation to be prop

erly documented is merely implied, the underwriters will not be discharged on account of the ship's being insufficiently or improperly documented, unless the loss happens from that cause.

her intended course. The verdict then stated, that before and at the time of sailing of the ship, &c., this country was engaged in war with Erance; and that the ship when she so sailed from London on her voyage for Guernsey, had not on board any sea-letter or passport made out and granted for her according to the forms annexed to the treaty; but at the time of her sailing from Guernsey, and from thence continually afterwards, until and at the time of the capture, she was furnished with and had on board her such a sea-letter or passport, &c. and which was exhibited and shown at the time of her capture and loss by the master of the ship to the commander of the French privateer.

Per Cur. The warranty that the ship was American does not mean merely that the ship was American built, but that she was entitled to all the privileges and indemnities of an American ship, otherwise it makes a difference in the value of the risk; and in order to be entitled to these privileges she should have had a passport. The assured ought to disclose to the underwriters all the circumstances, within his knowledge that may affect the quantum of the risk. Now if the underwriter had been informed that this ship would not have any passport on board in the first part of the voyage from London to Guernsey, perhaps the underwriter would not have insured for the same premium; for this reason we think that the plaintiff is not entitled to recover in this action.

[389] 9. *BELL v. BROMFIELD*. E. T. 1812. K. B. 15 East, 364. S. P. *SIMEON v. BARETT*. M. T. 1813. K. B. 2 M. & S. 94.

And as the obligation on the part of the insured may be extended by the consent of the parties, so on the other hand, the implied warranty that she shall be properly documented may be waived by the express terms in the policy, as, for instance, by a liberty to carry simulated papers.*

American goods, in an American ship, having been insured on a voyage from America to the Baltic, with liberty to carry simulated papers, and having been captured and condemned by a Danish sentence, which after suggesting a doubt as to the English character of the owner, stated that the positive contradiction which the documents contained concerning the property of the ship and cargo rendered it impossible to acknowledge them as neutral: and the prize court of appeal afterwards alledging as grounds of confirmation, 1st. That the ship's documents were not in due order, the sea-passport ordering, that before it could be considered of value, the captain must take his oath before the officer appointed for that purpose: but that though the passport was made out as if the captain had appeared before A. B., the notary public, and taken his oath, yet that neither the notary's name nor seal of office was under the document, and, therefore, that the sea-letter was to be looked on as a blank, and no credit could be given to it as a document. 2ndly. That the ship had false documents (which it exemplified by the journal). 3rdly. That the documents disagreed with regard to their contents (which is exemplified by the bills of lading and letters on board). 4thly. That a person on board, who seemed to be interested in the ship and cargo, had been set on shore in England. 5thly. That false French certificates *d'origine* were found on board. The Court held, that, taking the whole together, the ground of condemnation was, the having on board simulated papers, which, mixed with other circumstances, led to the conclusion that the ship and cargo were hostile British, and not neutral American property; and that the not having a sea-passport on board verified in the manner stated in the sentence, was only a circumstance to show that the ship carried simulated papers, even if such a passport were required by any treaty between the United States and Denmark, which did not appear, and consequently that the loss was attributable to a cause which the underwriter had sanctioned by the leave to carry simulated papers, and not from the ship's not being properly documented as an American ship ought to be, for which the assured, as owner of the ship as well as of the goods insured, would have been answerable.

(T) RELATIVE TO GENERAL AND PARTICULAR AVERAGE.†

* The underwriters will be liable when a vessel is illegally captured for the want of proper documents; see *Sewell v. Royal Exchange Assurance Company*, 4 Taunt. 589.

† Particular average means a damage sustained by the ship or goods, which fall simply on the thing itself. General average, on the other hand, is a loss which arises in consequence of the sacrifice of a part for the whole, and raises a claim to general contributions. The memorandum at the foot of the policy, by which the underwriters are exempted from liability for certain partial losses, has been already noticed in treating of the form and requisites of the contract; see *ante*, p. 127.

1. WILSON v. SMITH. T. T. 1764. K. B. 3 Burr. 1550; S. C. 1 Blac. 507.

An action on a policy of insurance was brought for the recovery of 56*l.* 19*s.* 8*d.* per cent., being the damage sustained by a cargo of wheat on board the *Boscawen*, insured at and from Lancaster to Rotterdam. The wheat was valued by agreement at 30*s.* per quarter; the policy was in the ordinary form with the usual clause at the bottom, that corn, fish, fruit, &c. should be warranted free from average, unless general or the ship be stranded. The defendant underwrote this policy for 100*l.*; the defendant having pleaded the general issue, the cause came on to be tried, and a special case was reserved for the opinion of the Court, stating that after the ship's departure from Lancaster, and before her arrival at Rotterdam, she met with a violent storm; that she was by and through the force of winds and stormy weather obliged to cut away, and leave her cable and anchor for the safety of the ship and cargo, and she was also greatly damaged and obliged to run to the first port to refit, that the expense of refitting the ship amounted to 38*l.* 15*s.* per cent., which the defendant in this case had paid, being a general average. The case then states that the hatches were not opened at Liverpool, the place where she had gone to repair, but the ship being refitted proceeded on her voyage and arrived at Rotterdam, where her cargo of wheat was landed; that upon her unloading it appeared that it had received partial damage by the said storm to the amount of 56*l.* 19*s.* 8*d.* per cent. The simple question was upon the true construction and meaning of the words "free from average unless general or the ship be stranded;" whether the plaintiff, as there had been a general average, could under the circumstances recover in this action for the damage of 56*l.* 19*s.* 8*d.* per cent. partial average, though the ship had not been stranded. After two arguments the Court gave judgment for the defendant.

Lord Mansfield. Policies of insurance according to their present form are very irregular and confused; an ambiguity arises in them from using the same words in different senses, particularly in the use of the word average. It is used to signify a contribution to a general loss, and it is also used to signify a particular partial loss. But whether it be considered in one or other of these senses, it will not avail the plaintiff in this case; for if it here signify contribution, the insurer is to be free from contribution unless the contribution be general. If it signify loss, then plainly it is warranted free from all particular loss. The insurer is liable to all losses arising from the ship's being stranded, and in all cases where there is a general average, but all other partial losses are excluded by the express terms of the policy; the word unless means the same as except, and never can be construed as a condition, in the sense that the counsel for the plaintiffs would put upon the word condition, namely, to be free from partial loss unless in two events, viz. a general average, or the stranding of the ship; but if either of those events did happen, then to be liable to all other average. The words "free from average unless general," can never mean to leave the insurer liable to any particular damage. It is clear then that the plaintiff ought not to recover, and that judgment ought to be given for the defendant.

2. NESBITT v. LUSHINGTON. T. T. 1792. K. B. 4 T. R. 783.

Action on a policy on wheat and coals, the declaration stating the loss to be by detention. It appeared in evidence that the ship was forced by stress of weather into Ely harbour, in Ireland, and there happening to be a great scarcity of corn there at the time, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove upon a reef of rocks, where she was stranded, and they would not leave her till they had compelled the captain to sell all the corn, except about ten tons, at a certain rate; the ten tons were lost in consequence of the stranding, by which it was damaged and obliged to be thrown overboard; the ship afterwards arrived with the rest of the cargo at the place of destination. A verdict was found as for a total loss. A motion was made for a new trial. There were other points in the cause, one of which has been already considered; as to this upon the memorandum,

Insurance
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does not ex-
tend to dam-
age receiv-
ed by goods
in a storm.
| 390 |

| 391 |

As the as-
sured can
only recov-
er an aver-
age loss up-
on the arti-
cles con-
tained in
the usual
memoran-
dum, where
the loss can
be ascribed
to the stran-
ding, the
declaration

must be framed as for a loss by stranding. Though different parts of a cargo are capable of a distinct and several valuation, yet there can not be a total loss as to one part only.

Lord Kenyon said: This being a policy upon corn, the memorandum states that the underwriter will not be liable for any average, unless general, or the ship be stranded; and I am of opinion that this is not a general average, because the whole adventure was never in jeopardy; there is no pretence to say that the persons who took the corn intended any injury to the ship, or any other part of the cargo, but the corn, which they wanted in order to prevent their suffering in a time of scarcity. Therefore, the plaintiffs could never have called on the rest of the owners to contribute their proportion as upon general average on the meaning of the memorandum. I have no doubt the articles there enumerated are of a perishable nature. As it might be difficult to ascertain whether their being damaged arose from any accident, or from the nature of the articles themselves, this memorandum is inserted in all policies to prevent disputes, and by it the underwriters expressly provide they will not pay any average unless general or the ship be stranded. When a ship is stranded, then the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though that fact cannot always be ascertained; therefore, here all the damage done to the cargo thrown overboard may be ascribed to the stranding; but the objection is, that the declaration imputes the loss to another cause.

3. DAVY v. MILFORD. E. T. 1812. K. B. 15 East, 559.

When the subject matter of a valued policy, warranted free from particular average, is in its nature divisible, the assured may recover for a total loss of part.

Policy of insurance on flax at so much, and warranted free of particular average if the vessel be wrecked, and the assured do not abandon, but labours to save the cargo, and in fact saves a part, though much damaged.

Lord Ellenborough, C. J. It was decided in the case of *Anderson v. The Royal Exchange Company*, that in order to constitute a total loss, where the thing insured subsists in specie, there must be an abandonment in time to the underwriters. In that case the assured might have abandoned while the corn remained under water, but they laboured to get it up and preserve it, and when they afterwards did abandon, upon finding that it did not answer to them, it was too late. It had been before held in *Mitchell v. Edie*, 1 T. R. 615, that an abandonment must be made promptly, if at all; otherwise, if part of the goods be saved to the assured, it is only an average loss. Here there was no abandonment; therefore, under the terms of this policy, which warrants the underwriters free from particular average, the plaintiffs cannot recover, unless there was an actual total loss. But how can it be said that there was a total loss of the whole, when one-sixth of the flax insured still exists in specie, though deteriorated, in the hands of the assured? As to that part, therefore, he cannot recover. But as to the rest, which was, in fact, totally lost, there is nothing, either in reason or precedent, to prevent me from saying that the plaintiffs may recover; for no case has been cited to show that where the least particle of the thing insured subsists in specie, though the greater part is actually destroyed, the assured shall be precluded from recovering the value of that which is, in fact, totally lost. Finding, therefore, no authority against the construction we have already intimated, and the reason of the thing being with it, we consider that the plaintiffs are entitled to recover, as for a total loss, the value of that part which was in fact totally lost, and that they are not entitled to recover for that part which was not totally lost, but still continued to subsist in specie, though deteriorated in value.

4. THOMPSON v. ROYAL EXCHANGE ASSURANCE COMPANY. M. T. 1812. K. B. 16 East, 214.

Under a policy on goods free from particular average the underwriters cannot be made liable by abandonment for a total loss.

The policy contained a clause making the underwriters free from particular average. The ship with her cargo on board, was driven from her anchor at Heligoland and wrecked; but the goods in question were afterwards got on shore and saved, though in a very damaged and unprofitable state; and the ship was broken up. The assured gave immediate notice of abandonment. But Lord Ellenborough unsuited the plaintiff, upon the construction of the clause against particular average.

Per Cur. All the goods were got on shore and saved, though in a damaged state. If this can be converted into a total loss, by a notice of abandonment,

the clause excepting underwriters from particular average may as well be struck out of the policy. We can only look to the time when the loss happened and the goods were landed, and then it was not a total loss, however unprofitable they might afterwards be.

5. *Dyson v. Rowcroft*. T. T. 1803. C. P. 1803. 3 B. & P. 474.

Policy on fruit from Cadiz to London, with the usual memorandum. In the course of the voyage the fruit was so much damaged by the sea-water, that it became rotten and stunk; and on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo; the ship, also, being too much damaged to proceed on her voyage, was sold, and the cargo necessarily thrown overboard. It was held, on a case reserved, that the assured were entitled to recover for a total loss, and

where the property wrecked is saved, however deteriorated.

Where any of the articles in the memorandum are thrown overboard to preserve the health of the crew

Chambers, J., said: The ship is expressed to have been so much damaged that she could not proceed, but was sold: now this must certainly have made a complete end of the voyage. We do not construe special cases so strictly as we do special verdicts. On the whole, therefore, it seems to me that the loss was total, and though the cargo might be said to exist in specie, yet in value it did not exist at all. If that be so, the inference of law is plain. What is it against which the underwriters protect themselves by the memorandum? Against partial damage. For what reason? Because, as the commodities enumerated are perishable in their nature, it might be impossible to ascertain with exactness what part of the loss arose from the nature of the commodity, and what from sea-damage. If ever there was a case of total loss, it certainly is the present.

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likely to be impaired from their deteriorated state, occasioned by a peril insured against, the loss is total.

6. *Scott v. Bourdillion*. T. T. 1806. C. P. 2 N. R. 213.

The only question was, whether rice was to be considered as corn, within the memorandum of the policy, which exempts the underwriters from a partial loss? And the usage having been proved to be against so considering it, the jury found a verdict for the plaintiff. A rule having been obtained, calling on the plaintiff to show cause why this verdict should not be set aside,

Rice is not corn, within the meaning of the memorandum.

Sir James Mansfield, C. J. said, that in cases like this the common sense of the words ought to decide, unless a clear usage to the contrary were shown; that the evidence produced at the trial was all on one way, and tended to show that rice was to be considered as within the meaning of the memorandum, and that no person reading the memorandum would be apprized that rice was intended to be exempted by it from partial loss.

7. *Palmer v. Blackburn*. M. T. 1822. C. P. 1 Bing. 61.

The ship *Juliana*, bound from the East Indies to London, was totally lost just before the termination of her voyage. The freight payable to the plaintiffs, in the event of the safe arrival of the ship, would have been 3068*l.*; but out of this the plaintiffs must have paid 699*l.* 9*s.* for seamen's wages, pilotage, light dues, tonnage duty, and dock dues, from which payment they were altogether exempted by the loss of the vessel. The defendant contended that the plaintiffs were entitled to recover from the insurers, not the amount of the gross freight, but only the amount of the net freight, after deducting the charges which the plaintiffs must necessarily have incurred had the ship arrived in safety; and he paid into court sufficient to cover his proportion of the amount of the net freight.

The general principle, that the assured shall recover no more than an indemnity in case of loss, may be controlled by mercantile usage clearly established to the contrary.

Dallas, C. J. The evidence in support of the usage was as strong as possible; the evidence on the part of the defendant only of a negative character; and I put it to the jury to consider whether the usage was so notorious as to imply a knowledge of it in the parties to the action, and so to form a part of their contract. But the defendant's counsel contends that, admitting the existence of the usage, it is contrary to law—contrary to the very principle of a policy of insurance, as being no more than a contract for indemnity—opening a wide gate to fraud, and hence that in law it cannot be supported. Without giving any opinion on the subject, I think the point of considerable importance, and worthy of further consideration.

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Policy on rice insured free of particular average, when the ship was wrecked, and the whole cargo, being greatly damaged, was taken out in craft and carried to the consignees and sold; the rice not producing sufficient to pay the charge of its freight, and the whole cargo producing little more than sufficient to pay the freight and salvage; it was held that this was a case of particular average.

8. GLENNIE v. LONDON ASSURANCE COMPANY. H. T. 1814. K. B. 2 M. & S. 371.

Insurance at and from C. to L. on goods in a ship by name, until the same should be there safely discharged and landed, rice free of particular average; and the ship, with rice and other goods, arrived within the limits of the port of L.; but, before she could be brought to her moorings or be at all unloaded, ran aground and was wrecked, and the whole cargo was greatly damaged, and was taken out of her in craft, and carried to the consignees at L., and sold, and produced upon the whole little more than sufficient to pay freight and salvage; but, the rice did not produce sufficient to pay the freight.

Per Cur. We think it quite clear that this is a case of particular average, and not a total loss. There has been an arrival of the ship with the goods, at their destination; the voyage has been performed, and the goods have come to the hands of the consignees. The argument is built upon facts which are not in the case; it assumes that the ship did not arrive in port, whereas there seems to be little doubt that she was within the port, when she took the pilot on board. Therefore, this is not a case of total loss of the goods, on account of the non-arrival of the ship; the ship had got within the practicable limits for her discharge; it is only a case of particular average. In the case mentioned, the ship was lost off the bar, without the limits of the harbour, which was the same thing as if she had been lost on the high seas; there was a total loss of voyage as far as respected the ship; she had neither arrived nor could she arrive; here she both could and did arrive. Taking it, therefore, that the ship and cargo were united for that adventure, there the conjoint adventure of the ship and cargo was disappointed. As to the argument, that the goods did not produce a profit to the assured, that depended upon the state of the market; they might have produced profit in a season of scarcity. But we cannot look to that; and if we could, it appears that the rice, which is said to be totally lost, did produce 97*l*. Assuming it to have produced nine-tenths less than its value, that will not make it a total loss.

9. TAYLOR v. CURTIS. E. T. 1816. C. P. 2 Marsh, 309; S. C. Holt, 192; S. C. 4 Campb. 337.

A ship being unable to escape from a privateer, resists the attack, beats off the privateer, [395] reaches her port, and delivers her cargo in safety; held that neither the expense of repairing the ship nor of curing the wounds of the sailors, nor of the ammunition, was the subject of general average.

This was an action of *assumpsit*; and the first count of the declaration stated that the plaintiffs, on the 2nd of September, 1815, were owners of the ship *Hibernia*, which was then proceeding on a voyage from this kingdom to the island of St. Thomas, with a cargo of merchandise, of the value of 21,000*l*. on freight; that the said ship was attacked by certain enemies of our Lord the King, viz. persons acting under the authority of America, who endeavoured to capture the said ship and cargo, which the master and crew resisted, and in the proper and necessary defence thereof, and in endeavouring to preserve the same from capture, the said ship and the furniture thereof were greatly damaged, and the plaintiffs were obliged to expend the sum of 5000*l*. in repairing the said damage; that the ship and cargo were, by the said resistance and defence, preserved from capture, and afterwards completed the voyage; that, at the time when the said ship was so attacked, and the said damage and expense so incurred, and during the said voyage, the defendant was owner of part of the goods on board, of the value of 1000*l*., and was benefitted in respect thereof by the said resistance and defence; by reason whereof the defendant, as such owner, became liable to contribute to the said damage and expense as a general average; and, in consideration of the premises, promised to pay the plaintiff so much as he was liable to contribute; and that he was liable to contribute the sum of 140*l*. There were two other counts, varying the statement of the facts, another of *indebitatus assumpsit* for general average, and the usual money counts, with a general breach to the whole. The defendant pleaded *non assumpsit*. It appeared from the admissions on both sides, that the *Hibernia* sailed from Portsmouth with convoy on her voyage to St. Thomas, on the 27th of November, 1813; that on the 2nd of December she lost the convoy, and on the 11th of January, being then in sight of some of the West India Islands, she saw two American schooners, one of which gave

chase and came up with her about eight in the evening; that a running fight commenced; which continued the whole of the night, during which she several times beat off the privateer; that she came to an anchor in the harbour of St. Thomas, on the next day, and afterwards delivered her cargo in safety; and that in the course of the engagement two of the Hibernia's crew were killed, several wounded, and considerable damage was done to her hull and rigging. Gibbs, C. J. directed a verdict for the defendant, subject to the opinion of the Court, whether the plaintiff was entitled to recover as for general average.

Per Cur. The only question is, whether the defendant be liable to contribution in respect of his part of the cargo? that is, whether the articles, in respect of which the plaintiffs seek to recover, do or do not fall within the description of general average, as understood by the mercantile world in this country? The doctrine of general average has its origin in the Rhodian law, as appears by Justinian: "*Omnium contributione sarcitur quod pro omnibus datum est.*" The different states of Europe have made different regulations on this subject, all of them professing to follow the Rhodian law, but often differing from each other; and the foreign jurists have made very different comments upon that law. In this country there are no local regulations on this subject; we should, therefore, as in all doubtful cases, resort to the judgment of our municipal courts, if this point had ever arisen there. The damages claimed fall under three denominations: 1st. The damage done to the vessel and rigging in the engagement. 2nd. The expense of curing the wounded sailors. And 3rd. The ammunition expended in the defence. There is nothing in any of the foreign jurists, which we think ought to govern us on these points, unless they had been supported by admitted principles, decided authorities, or general usage. None of the decided cases apply to the present; and we have unfortunately been so long engaged in war, that instances of this kind must frequently have occurred; and as there appears to be no case in which a demand like the present has been made, we must conclude from that silence that no general usage which could justify such a demand has existed, and therefore that such losses cannot be taken to fall within the principle of general average. If it could be shown that such losses do fall within the general principle, we agree that the plaintiffs would have been entitled to recover, though this had been the first case in which such a demand had been made. But there is great doubt on the subject, and the inclination of our mind is, that they do not. It is true, the determination to resist was resolved on for the general interest; but still it is not like the case of casting goods overboard for the general benefit. The loss fell where the chance of war directed it, and where, therefore, in point of justice, it ought to fall. If this opinion be right, the plaintiffs are not entitled to recover.

10. COVINGTON v. ROBERTS. H. T. 1806. C. P. 2 N. R. 378; S. C. 2 Marsh. Ins. 547.

Action on a policy of insurance. The Nancy was captured by a French privateer, but on account of a heavy gale, and the sea running high, the privateer could not take possession of her; it appeared that the Nancy, in order to escape from the privateer, carried an unusual press of sail, in consequence of which she was much strained, opened most of her seams, and carried away the head of her mainmast, but finally succeeded in getting away. A verdict was taken for 100*l.* subject to the award of an arbitrator, who was to ascertain the amount of the average between the parties.

Per Cur. In the case of Berkley v. Presgrave, 1 East, 220, there was an article given up for the benefit of the whole concern. A cable was sacrificed. The language of Mr. Justice Lawrence is, that all loss which arises in consequence of extraordinary sacrifices, or expenses incurred for the preservation of the ship and cargo come within the description of general average. This is only a common sea risk; if the weather had been rather better, or the ship stronger, nothing might have happened. The word "particular" may be inserted in the order.—Rule discharged.

If a ship, in order to escape from a privateer, carry an unusual press of sail, and succeed in getting away, but

sustain damage in so doing, this is a particular, not a general, average.

11. JACKSON v. CHARNOCK. E. T. 1800. K. B. 3 T. R. 509.

When, for the safety of a ship it becomes necessary during the voyage to put into port to refit the expense of refitting is not a general average.

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The plaintiff, Jackson, was owner of the *Britannia* in 1796, and the other plaintiff, Stewart, was captain of the same. On the 19th of November, 1796, Jackson let to hire the ship for a voyage from London to India, and back again to the defendant, who had contracted to furnish to the East India Company extra ships for their trade. The ship arrived safely at Bengal on the 10th of December, 1797. After being surveyed by the East India Company's officers, and reported seaworthy, she left Bengal, laden with goods for the East India Company, to whom the ship was let by the defendant. On the 22nd of the same month it was discovered that she had sprung a leak, and which leak gained upon the ship, notwithstanding the exertions of every part of the crew to keep it under. A consultation was holden by the officers of the ship, who were unanimously of opinion that it was necessary for the common safety that the ship should be lightened as soon as possible of those materials and part of the cargo, was thereupon thrown overboard; and in consequence of the ship being thus lightened, she arrived in Table Bay at the Cape of Good Hope on the 16th of February, 1797; immediately on her arrival at the Cape, the ship, with the concurrence and approbation of the agents for all parties, was surveyed, and that on survey it was found that she could not proceed to England without being repaired, and that she could not be repaired without having her cargo taken out; a ship called the *Bombay Castle* was therefore hired, on board of which the cargo was placed, and the *Britannia* was thereupon repaired. The amount of the repairs and other necessary incidental charges connected with the repairs, together with the expenses of maintaining the crew, amounted to 4,395*l.* 4*s.* 6*d.* As soon as possible the cargo was reshipped, the ship proceeded with the utmost despatch to St. Helena, in her way to England; and after being captured and recaptured in the course of her voyage from thence to England, she arrived safely at the port of London, on the 5th of October, 1798, and there landed and delivered what remained of her cargo into the Company's warehouses. The question for the opinion of the Court arose solely on the construction of the charter-party, and was, whether or not the defendant was only liable to such general average as arose on the goods thrown overboard, or also to general average on the repairs and other expenses at the Cape of Good Hope.

Per Cur. This is not a question of general average, but on the construction of this charter-party; namely, whether or not all the damages done to the ship during the whole voyage were to be repaired by the owners? And on this question the second, tenth, and twenty-second articles seem decisive against the plaintiffs. By the second it was stipulated that the vessel should, at her departure outwards and homewards, and also during the whole of the said voyage, be kept strong and tight at the owners' expense. By the tenth it is particularly provided, that the defendant might, at any time during the voyage, survey the ship, and if any thing were wanted or deficient, the owners would supply it. Now, on her arrival at the Cape of Good Hope something was wanting, and therefore that should have been supplied at the expense of the owners. The eighteenth article also affords a strong argument against the plaintiffs; by that the parties agreed that, for the preservation of the ship or cargo, the defendant should contribute his proportion of a general average in respect of such goods, and that shows that he was not to be liable to general average in other cases.

12. DA COSTA v. NEWNHAM. E. T. 1788. K. B. 2 T. R. 407. S. P. POWER v. WHITMORE. E. T. 1815. K. B. 4 M. & S. 141.

When a ship is detained by an embargo, the expense of wages and provisions falls

The ship insured met with an accident in the course of her voyage from Leghorn to London, and was obliged to put into Nice to repair; advice thereof was transmitted to the owner (the plaintiff), and that it was necessary to unload the vessel, and that a considerable expense must be incurred. This account was communicated by him to the underwriters at the same time that he expressed his desire to abandon. An altercation arose between them upon this subject, he being desirous of abandoning altogether, and they insisting up-

on the vessel's being repaired, and telling him to pay the tradesmen's bills. [398] He consented at last, however, that the repairs should be done, but refused to advance any money, in consequence of which it became necessary to take up a large sum on a bottomry bond, which was accordingly done. Before the repairs were begun the crew were discharged, and several of them afterwards hired at different times, at so much per diem, to assist in the work. The ship was refitted and resumed her voyage, and gained freight afterwards. When she arrived at her port of discharge application was made to the underwriters to take up the *respondentia* bond, which they refused to do, and therefore the vessel was obliged to be sold in order to satisfy that debt, so that she never was in the free possession of the plaintiff again. The amount of the *respondentia* bond, together with the interest due, was 678*l.*, and the ship sold for 600 guineas. Under these circumstances, solely on the ship owner, and is not a subject of general average.*

Buller, J., stated that it had been agreed at the trial, and he had so stated it to the jury, that there had not been a total loss at Nice; for though the plaintiff had offered and was entitled to abandon, yet, in truth, he had not abandoned. Then, considering it only as an average loss, the question was, whether the underwriters should be liable for the full amount of the insurance? The bottomry bond was only 600*l.*, but the ship never came free into the plaintiff's hands; for, in consequence of the refusal of the underwriters to discharge it, she was obliged to be sold. He thought that as for all the subsequent injury which has accrued to the plaintiff in consequence of that refusal, and by which the plaintiff was damaged to the whole amount of the insurance; the underwriters were liable, because it was their own fault in not taking up the bond for the expenses of those repairs which have been incurred by their own express directions. Then the only remaining question was, how the average should be calculated? As to that, he said, four or five different methods had been delivered in to him, which were then in court; one of these was a paper delivered in by the defendant, which he should at once lay out of the question; for in that one-third of the sum charged for repairs was taken off, which was the usual sum allowed, in respect of new work for old. Now this was never allowed unless the ship got into the possession of the owner again; for the usage in that case was founded upon the idea that the owner got the ship the better for the repairs; therefore, that the rule did not apply in this case. As to another article respecting freight, there is no doubt but that the freight must contribute to the general average.

The grounds on which the rule for a new trial had been obtained were, that in the account of the charges and expenses incurred at Nice, and for which the bottomry bond has been given, there were many articles for which the underwriters on the ship were not liable, such as the charges for wages and provisions, shipping and unshipping the cargo, warehouse-room, taking care of the cargo, &c.; that besides, at the time of the accident there was above 300*l.* [399] due for freight, no part of which was applied to these purposes, which would have superseded the necessity of taking up so large a sum on *respondentia*; and again, that no allowance had been made for thirds in the repairs, which the underwriters were entitled to by the usage of trade; and also upon an affidavit that the amount of the goods had been undervalued.

Per Cur. General average must be proved by them; there was no proportion agreed on at the time they directed the repair; they were bound in the first instance to pay the whole amount of the bond. This is not like the case put of a total loss, without benefit of salvage, for the plaintiff agrees to allow that; nor is it like the case where there is an election in the party to abandon or not, where that election must be made either one way or the other; for here by the consent of the underwriters the plaintiff has steered a middle course; they pointed out to him what he should do, and they must abide by the consequences of there interference. As to its not appearing that any specific de-

* Freight is liable to contribute to general average; see *Williams v. London Assurance Company*, 1 M. & S. 318; *S. P. Da Costa v. Newnham*, 2 T. R. 407; *S. P. Cox v. Sarry*; 4 M. & S. 149.

mand was made upon the defendant for his share, it would be monstrous to require that the particular portion of each individual should be separately demanded, when they are all acting as a body; a demand upon any one of them, with that view, was sufficient. Then the case is reduced to a mere question of damages: 1st. As to the one-third for repairs; I have already given it as my opinion that the underwriters were not entitled to it, because the plaintiff never had the ship again. 2nd. As to the wages and provisions; that is not like the case where a ship is detained by an embargo, where the Court have said, that the expense shall fall on the owner only, and the freight must bear it; but this is a question of general average, the ship having been obliged to go into port for the general benefit of the whole concern. A passage from Beaves is mentioned in Park, 143. showing the law in foreign countries upon the subject that when a ship is forced by a storm to enter into a port to repair the damage she has suffered, if she cannot continue her voyage without an apparent risk of being lost, in such case the wages and victuals of the crew are brought into an average from the day it was resolved to seek a port to refit the vessel to the day of her departing from it, with all the charges of loading, unloading, anchorage, pilotage, and every other expense incurred by this necessity. But I do not know that this point has ever been settled in England. There is one case mentioned in the same book (Park, 142), where Lord Mansfield seemed to approve of this rule; but it is not necessary to determine that point now; for it appears that the crew had been all discharged, and these men were only employed as common workmen. As to the difference in the value of the goods, as it is now stated, that only makes a difference of two and a half per cent., which is not a sufficient ground for a new trial, inasmuch as it appears that the verdict has been taken for ten per cent. less than the plaintiff is entitled to. On the whole, I am of opinion, that this rule should be discharged: 1st. Because, under the interference and directions of the underwriters, and their subsequent conduct in refusing to pay the bottomry bonds, they are liable for all the damage which has happened to the plaintiff; and 2nd. Because this is a question of general average, and the ship, goods, and freight, should all contribute their several proportions.

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If the whole adventure is in jeopardy and a sacrifice is made it seems immaterial to what particular cause the damages may be attributable to entitle the party to contributions as for a general average.

13. *PLUMMER v. WILDMAN.* H. T. 1815. K. B. 3 M. & S. 486.

The material facts were, the ship *Cambridge*, of which the plaintiff's were the owners, sailed on the 26th of April, from Kingston, in Jamaica, where she was loaded with a cargo for London, consisting of sugars and rum, a part of which belonged and was consigned to the defendant by bill of lading, deliverable to him in London, he paying freight with primage and average accustomed. A day or two after the ship sailed, and while she was in the prosecution of her voyage, she was run foul of by a brig, which was unavoidably driven against her by the violence of the wind and weather; by which accident her false stem and knees were broken, and the master was in consequence obliged to cut away part of the rigging of her bowsprit, and to return to Kingston to repair the damage sustained by the accident and the cutting away. The ship could not have prosecuted her voyage, nor could she have kept the sea with safety, without returning and repairing. Upon her return the cargo was necessarily unloaded and warehoused, in order that such temporary repairs might be done as would enable her to prosecute her voyage; and the master, towards defraying the expenses, sold twelve hogsheads, three tierces of sugar, and two puncheons of rum, one of which was part of the defendant's consignment, and was sold for 15*l*. When the repairs were finished, the remainder of the cargo was reloaded, and the ship proceeded to London and delivered it to the defendant and the other consignees. After the ship's arrival in London, she underwent a more effectual repair of the damage, the expense of which the plaintiffs did not include in their claim for contribution; but they claimed in respect of the sums to be disbursed by them at Jamaica in consequence of the accident. The particulars of the disbursements, in respect of which the plaintiffs claimed, contained amongst other disbursements, for pilotage into Kingston on the ship's return; for surveying and

ascertaining the damage, and repairing the same, smiths' and carpenters' work, and for materials; for wharfage and cooerage on landing and stowing the goods during the repairs; for reloading; for the master's expenses, five dollars per diem, during the unloading, repairing, and reloading; for crimpage, to replace deserters during the repairs, &c. And the question made was, whether this was a case of general average, and if it were, to what extent? it being agreed that when the Court should pronounce the rule, if they should be of opinion that the defendant was liable to any part, the amount should be settled by arbitration. If the defendant was not liable beyond 15*l.*, for which his puncheon of rum was sold, a nonsuit to be entered.

Per Cur. If the return to port was necessary for the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question, whether the first cause of the damage was owing to this or that accident of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting her voyage, unless she returned to port and removed the impediment. As far as removing the incapacity is concerned all are equally benefitted by it, and therefore it seems reasonable that all should contribute towards the expences of it; but if any benefit (*ultra*, the mere removal of this incapacity,) should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the ship owner only, it will not come under the head of general average, but that will be a matter of calculation upon the adjustment. The amount of the expences of repairing to be placed to the account of general contribution must be strictly confined to the necessity of the case, and the arbitrator will have to determine how much was expended upon such repairs, as were absolutely necessary to the enabling the ship with her cargo to prosecute the voyage; and for so much, and no more, the defendant will be liable to contribute. As to the charge for the captain's expences during the unloading, repairing, and reloading, the shipowner must bear the captain's expenses in part, and crimpage must be disallowed; it does not come under general average.

14. HEARNE v. EDMUNDS. M. T. 1819. C. P. 4 Moore, 15; S. C. 1 B. & B. 388.

Policy of insurance upon ship and goods from Newfoundland to Waterford and Cork, or Cork and Waterford, both or either, including all risk in craft to, and from the vessel. It appeared that the captain took pilot at the entrance of Cork Harbour; that on the 1st of January, 1819, in the progress up the harbour the vessel took ground from shallowness of water, and remained aground for eight hours, until the tide enabled her to float; that on the 3rd of January she took the ground from the same cause, at nine o'clock, and remained for eleven hours, until again floated by the tide; that on the 3rd, the pilot still remaining in command, the vessel, was under his direction, moored during high water at Pope's quay, where she was to discharge her cargo of fish, and on the ebb of the tide took the ground, made a lust, and lay on her broadside for two whole tides, by which the vessel and cargo were much injured. The taking the ground in manner abovementioned was stated by a witness to be no more than is usual with all vessels of the same class, in proceeding up Cork river. The jury concurred with Dallas, C. J. in thinking that this was not a stranding, and found a verdict for the defendant.

Dallas, C. J. I had no doubt at the trial; and I have none now. This event happened in the ordinary course of navigation; and if it be held a stranding, every vessel which goes up the river at Cork must cause a loss to the insurers. In *Carruthers v. Sydebotham*, the vessel was moored contrary to the usual way, out of the usual place, and against the express orders of the captain. Here the vessel was proceeding in the ordinary way; and if this be that term

* A ship being captured by a privateer, escapes by using a press of sail, but in so doing in the mean while suffers material damage; held, that this was not a general average, but a partial loss, for which the underwriters were liable; see *Covington, v. Roberts*, 2 N. R. 378; S. C. 2 Marsh. Ins. 547.

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A vessel with a cargo on board took ground on two successive days in going up Cork harbour under the direction of a pilot; and, being after wards moored in the usual course, was thrown on her broadside by the receding of the tide, and received a considerable injury.

held a stranding, all insurance to the port of Cork (where vessels are obliged to take the ground) must cease. Before the port of Bristol was improved, every vessel which arrived there was obliged to take the ground.

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Where a ship's striking the ground arises from accident, and is out of the usual course, it is a stranding within the policy.

15. *HARMAN v. VAUX*. T. T. 1813. N. P. 3 Campb. 429.
The policy contained the usual memorandum, warranting corn free from average, unless general, or the ship be stranded. As the ship was proceeding down the river from Limerick, and was proceeding off Scakry Island, the wind, which was moderate, suddenly took her ahead, and she went on shore stern foremost. There she remained fast for two hours, till the tide flowed, when she got off and proceeded on her voyage. A witness stated that she must have strained a good deal while lying on the ground; but when she again floated, it was not perceived she had sustained any injury. On her arrival at Oporto the barley was found considerably damaged; she experienced stormy weather on her passage thither. The only question was whether the ship had been stranded within the meaning of the memorandum? It was for the defendant contended, that it must be a stranding from which a reasonable presumption arises that the cargo has been damaged. If there was evidence that any damage had been produced by the ship being aground, then it fulfilled the condition, and rendered the underwriters liable for any average loss that occurred from that or any other cause. But for this purpose it was not enough that a ship should be left dry for an hour or two on a mud bank, in a river—a circumstance perpetually happening, without being considered a mischance.

Lord Ellenborough. I make no doubt that was a very sound construction of a fiscal law; but I am of opinion there was here a clear stranding, within the meaning of the memorandum. It is not merely touching the ground that constitutes a stranding. If the ship touches and runs, the circumstance is not to be regarded; there she is never in a quiescent state; but if she is forced ashore, or is driven on a bank, and remains for any time upon the ground, this is a stranding, without reference to the degree of damage she thereby sustains. To remove all doubt upon the question, this clause is introduced. The stranding is a condition precedent; and when that is fulfilled the warranty against particular average ceases to have any operation.

16. *BURNETT v. KENSINGTON*. E. T. 1797. K. B. 7 T. R. 210; S. C. 1 Esp. 417. S. P. *M'DOUGLE v. ROYAL EXCHANGE ASSURANCE COMPANY*. H. T. 1816. N. P. 4 Campb. 284.

If the ship be stranded in the course of the voyage the underwriters are liable for the average loss on the articles in memorandum arising from the perils of the sea, though no part of the loss arises from the act of stranding.

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The plaintiff on the 15th of January, 1795, caused the assurance in question to be made upon a cargo of fruit on board the ship *Commeſce*. The defendant subscribed the same for 150*l*. The plaintiff was interested in the cargo beyond the amount of the sum insured, and the assurance was effected in his name and for his benefit. On the 30th of November, 1794, the ship sailed with convoy from Malaga with her cargo, consisting of oranges and lemons, to be delivered at Portsmouth and Plymouth, and afterwards parted with her convoy in a gale of wind. On the 29th of January, 1795, in the course of her voyage, she arrived off Scilly, and between the hours of seven and nine on the morning of that day struck upon a sunken rock, about three leagues and a half from the land of Scilly; but she did not remain on the rock, but in consequence of the striking thereof, several of her planks were started, and the water immediately after flowed into the hold and over the cargo, and continued to increase in the hold for about three hours and a half. About twelve o'clock on the same day the ship was stranded upon the beach of Scilly; she was so stranded by the captain under the directions of a pilot who had come on board her from the shore, in order to save the ship and cargo. The ship continued some time upon the beach, during which the water again flowed in and over part of the cargo at the return of the tide. The ship afterwards proceeded on her voyage and arrived at Plymouth on the 24th of February following with the greatest part of her cargo. The cargo of fruit was very much damaged, and a small part thereof left at Scilly, being entirely unfit for use. *The ship received no damage in consequence of the stranding.* The da-

mage she received was entirely from the rock on which she struck; part of the damage the cargo received was occasioned by the water flowing into the ship previous to her being laid on the beach, and part was occasioned by the water that flowed in subsequent to the time of her being laid on the beach. But the cause of the water flowing in arose entirely from the ship striking on the rock, and not from any mischief done to the ship by stranding. The question was, first, whether the plaintiff were entitled to recover for all the damage received by the cargo? if he were then the verdict was to stand; or secondly whether the plaintiff were entitled to receive for such part only of the damage as was occasioned by the cargo by the water that flowed in subsequent to the time of the ship being laid on the beach? In that case a verdict was to be entered for £—. But if the Court should be of opinion that the plaintiff was not entitled to recover any thing, then a verdict was to be entered for the defendant. Although the jury found that part of the damage happened after the stranding, it also found as a fact that the ship received no damage in consequence of the stranding; and if the ship had not been stranded, both the ship and cargo would have been totally lost. The question, therefore, is, whether an average loss is payable to any amount, however great, from whatever cause the loss may arise, if the ship happen to be stranded?

Per Cur. Now, considering how extremely inaccurate a policy of insurance is penned, we think that too great stress ought not to be laid on the precise words used in it. If the exception in the memorandum be confined to losses arising from the stranding, it must be from this consideration, that otherwise it would be a temptation to the master to strand the ship, if any trifling damage were done to the cargo, to enable the assured to recover. On the other hand, if nothing can be recovered from the insurers but for damage arising from the stranding, it would be the interest of the master to desert the ship whenever a stranding happened, and when there would be a total loss. However, in a case where words of the policy are inaccurate, and where there are inconveniences attending each construction, if the case has ever been decided, we think that we ought to be guided by it. In the case of *Wilson v. Smith*, which was principally relied on for the defendant, Lord Mansfield seemed to consider that the word "unless," did not create a condition; but that the meaning of the exception was, that the underwriters should only be liable for an average loss in two cases; one where there is a general average, the other where the damage arises from the stranding. But in so considering it, Lord Mansfield went beyond the facts of the case then before the Court; for there the question was, whether the assured was entitled to recover a partial average from the circumstance of his being entitled to recover a general average? Now the words of the exception are not "warranted free from average, unless there be a general average, or unless the ship be stranded;" but "warranted free from average, unless general, or on the ship stranded;" therefore, as there is a difference in the expression of these two exceptions, perhaps it may be considered as a condition as applied to the stranded, though it be not a condition as applied to the general average. If so, then there is only one authority in point, that of *Cantellon v. The London Assurance Company*, in which according to the report of it in *Burrow*, it was considered that the stranding was a condition, and that the underwriters were liable on the happening of that condition. Therefore, as the very question has been once decided, we think it ought to govern our decision in this case, especially as the question arises on the construction of an instrument, so inaccurately penned as a policy of insurance.—*Postea* to the plaintiff.

16. *RAYNER v. GODMOND*. M. T. 1821. K. B. 5 B. & A. 228.

Per Cur. This was an assurance on a perishable commodity, and the object of the memorandum was to exempt the underwriters from loss, unless there was an adequate cause for it. If, however, the ship was stranded, they were to be liable. The case of *Carruthers v. Sydebotham* is very like this. There on the ebbing of the tide, the ship fell over and received damage, and the Court held, that it amounted to a stranding, because the ship was upon a strand. In *Hearne v. Edmunds*, the ship never was on the strand, within the

When, during the course of the voyage upon an inland navigation, it becomes necessary, in order to repair the navigation, to draw off the water, and the master, in consequence

quence, placed the ship in the most secure situation that he could find, but when the water was drawn off the vessel ground upon piles that were not previously known to be there, this was holden to be a stranding within the memorandum.

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When a ship, being under the conduct of a pilot, in her course up the river Mersey, was, against the advice of the master, fastened at the pier of the dock-basin by a rope to the shore and left there, and, having taken on the ground when the tide left her, fell over on her side and bulged, this was held a stranding;

So it is a stranding when a ship strikes upon a rock and remains fixed there for fifteen or twenty min-

meaning of the parties; for there, in the ordinary course of the voyage, it was quite certain that the vessel would, by the regular flux and reflux of the tide, be left on the mud. And the fair construction of the words of this memorandum, which reconciles that case with *Carruthers v. Sydebotham*, must therefore be, that when in the ordinary course of the voyage the ship must go on the strand, the underwriter is exempt; but where it arises from an accident, and out of the ordinary course, he is liable. That was the case here, and, therefore, the verdict is right. If *Carruthers v. Sydebotham* had been broken in upon by subsequent decisions, it might, perhaps, have been necessary to reconsider it; but the case of *Hearne v. Edmunds*, in the Common Pleas, has confirmed it. Here, the accident producing the loss was one not to be expected. In the case in the Common Pleas the event must happen every tide. I think a stranding may properly be said to take place where a ship by accident, and not in the ordinary course of the voyage, is rendered immovable on the strand.—Rule refused.

17. *CARRUTHERS V. SYDEBOTHAM*. E. T. 1815. K. B. 4 M. & S. 77.

A ship being under conduct of a pilot, in her course up the river of Liverpool, was, against the advice of the master, fastened at the pier of the dock-basin by a rope to the shore and left there, and she took the ground, and when the tide left her, fell over on her side and bulged, in consequence of which, when the tide rose, she filled with water, and the goods were wetted and damaged. On the question, whether this was a stranding to entitle the assured to recover for an average loss upon the goods?

Per Cur. The underwriter has paid as upon a loss except in respect of a particular portion of the cargo. And the question is, whether there has been a stranding within the meaning of the policy? which will depend upon whether that which has happened occurred in the course of the voyage, and from one of the perils insured; the perils insured being all the ordinary perils to which ships in the course of navigation are liable. It appears that the master was compellable by law to take on board a pilot, and it was in consequence of his misconduct that the ship being upon an element to which the insurance extends, was placed in such a situation that when the water left her she fell upon her side; and thus the damage happened. Undoubtedly this amounts to a stranding, because the ship was upon a strand. Therefore, the only question is, whether that is a peril which the underwriters insured against? and we think it is; because this was not a peril occasioned by the act of the masters or mariners, from which the underwriter shall be exempted, but is to be considered as the act of the pilot. Independently of the general principle, the pilot act provides, sect. 30. that the owner of any ship or consignee of goods shall not be prevented from recovering any loss or damage upon any contract of insurance, by reason of any neglect of any pilot taken on board under any of the provisions of that act. And what are the provisions of that act? They expressly relate to pilots appointed and taken on board under the regulations existing within particular districts. Such are the provisions that a particular description of the person of every pilot shall be written or endorsed on his license, see sect. 44; and that every pilot-boat of every corporation or society established in relation to pilotage, or of any person authorized by them to act as a pilot, shall be painted in a particular manner, and shall carry a particular vane or flag; see sect. 49. And sect. 59. expressly applies to any limits for which pilots have been or shall be appointed by lawful authority, making the master compellable, under pain of a particular forfeiture, to take a duly licensed pilot on board. Therefore, it may fairly be said that such pilots as one taken on board within this district, are taken on board under the provisions of the general act; because the general act relates in its provisions to pilots appointed to limited districts.

18. *BAKER V. TOWRY*. M. T. 1816. N. P. 1 Stark. 436.

Action on a policy of insurance. The vessel, with the insured goods on board, set sail on the 21st of June, 1814; on the 25th, she encountered the Forge and Rock Basket, which are a cluster of rocks extending about six miles in length, the Great Basket being about a cable's length from the main,

land, and the Forge rock being from thirty to forty feet in height above the level of the sea. A strong current setting in towards the land, the vessel could not avoid the rock; in attempting it she struck upon it, and remained there from a quarter of an hour to twenty minutes. In consequence of this accident the vessel received considerable injury, and leaked much during her voyage to Cadiz.

Lord Ellenborough, informed the jury, that if they were of opinion, upon the evidence, that the ship had been fixed as stated by the witness, for the space of from fifteen to twenty minutes, it was sufficient to constitute a stranding. [406]

19. *M'DOUGLE v. ROYAL EXCHANGE ASSURANCE COMPANY.* H. T. 1816. K. B. 4 M. & S. 503; S. C. 4 Campb. 283.

Action. The ship in coming out of New Grimsby, where she had been driven by stress of weather, with a pilot on board, struck upon a rock, about the distance of a cable and a half's length from the shore, and remained upon the rock a minute and a half. The captain swore that the ship was laid upon her beam ends when she was upon the rock. And the question was, whether the particular loss occasioned by this accident was a loss occasioned by the stranding of the ship? But not where she remained only a minute and a half.

Lord Ellenborough, C. J. ruled, that a stranding imported some degree of continuance on the shore, and not merely, as it was commonly termed, to touch and go; and the plaintiff was nonsuited.

Per Cur. The evidence was, that the ship, in coming out of harbour, struck on a rock, where she remained a minute and a half, to the best of the captain's judgment. If this constitutes a stranding, it will come to this, that an instantaneous stoppage of the ship's progress must be a stranding; the most minute portion of time that division is capable of will be enough. But I take that stranding in its fair legal sense implies a settling of the ship, some resting or interruption of the voyage, so that the ship may *pro tempore* be considered as wrecked, from which misfortune a vast deal of damage does frequently occur. We really thought at the trial that there was more waste of time than such an inquiry needed. Running on some wooden piles four feet under water erected in a river about nine yards from shore, for the purpose of keeping up the banks, and lying on such piles till they were cut away,

20. *DOBSON v. LONDON ASSURANCE COMPANY.* M. T. 1798. K. B. 1 Park, Ins. 148; S. P. *BOLTON v. DOBSON.* 1 Marsh, Ins. 231.

Lord Kenyon told the jury that a ship's running on some wooden piles, four feet under water, erected in Wisbeach river, about nine yards from the shore, but placed there to keep up the banks of the shore, and lying on such piles till they were cut away, was a stranding within the meaning of the policy, so as to subject the underwriter to an average loss on corn. The jury found accordingly.

21. *HEDBERG v. PEARSON.* M. T. 1816. C. P. 2 Marsh. 432; S. C. 7 Taunt. 154; Holt, 349.

It appeared that the vessel grounded at Drago, near Copenhagen; that all the hogsheads containing the sugar were got on shore, and that every one of them had some sugar in it, though, in general, not much; and that it was nearly all damaged. The question was, whether this were a total or an average loss? The plaintiff contended that it was the former, and cited *Davy v. Milford*, see 15 East, 559. where it was held, that though the insured had saved one-sixteenth of the goods insured, consisting of flax, he was entitled to recover as for a total loss of the rest, which was entirely lost. When a ship was stranded, and the cargo consisted of hogsheads of sugar, was all got ashore, each hogshead containing some sugar though but little, and nearly all

Gibbs, C. J. I was desirous of reserving the point, but the jury were of opinion that it was a clear average loss within the meaning of the common memorandum at the foot of the policy, and accordingly found their verdict generally, for defendant. The case of *Davy v. Milford* differs from the present, because here, each hogshead had some sugar saved in it, though but little. If head containing any of the hogsheads had been entirely lost, it would have been a total loss as to them; but as it is, I do not see where we could stop, or how draw the line. The jury, also, who are in general very conversant with this subject, thought it was clear within the memorandum, and they did not mean to form an inter-

damaged, held that the jury was warranted in finding this to have been an average loss only.

Average loss on a valued policy is to be estimated by the real value of the goods on board.

perate opinion on the subject. Even taking it to be a case for the consideration of the Court, I do not think we should decide otherwise.

22. *HAMILTON V. MENDEZ*. H. T. 1761. K. B. 1 Blac. Rep. 279.

A ship valued at a certain sum was insured on a voyage from Virginia or Maryland to London: during the voyage the ship was captured by the French, who took out nearly the whole of the crew, and put in a prize master to carry her to France. Having remained seventeen days in possession of the enemy, she was captured by an English man-of-war, and carried into Plymouth, whence she was brought into the port of London by the order of the supercargo and the re-captors. The assured having received intelligence of what happened gave notice to the underwriters of his intention to abandon. It appeared that no damage had been sustained from the capture, except what arose from the temporary interruption of the voyage, and a charge for salvage, which the underwriter had offered to pay; the cargo had been delivered to the freighters, who had paid freight for the same. An action having been brought, in which the assured claimed as for a total loss, the Court held, that in cases of insurance the plaintiff's demand is for an indemnity; consequently, his action must be founded upon the nature of the injury sustained at the time of action brought; that as it was repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event had decided that the real injury was an average loss only, the plaintiff in the present case was entitled to recover for an average loss only. At the conclusion of the judgment,

Lord Mansfield said, that the Court desired it to be understood that the only point determined was, that on a valued policy the plaintiff could not recover more than the actual loss which had happened at the time when he chose to abandon.

23. *TAITE V. ROYAL EXCHANGE ASSURANCE*. T. T. 1747. 1 Park, Ins. 138.

In estimating the value of interest in case of a partial loss, the insured is entitled to add [408] to the value of his goods the amount of his premium, not only on the value of his goods but also upon the sum insured.*

Insurance on goods on board the ship *Biddy*, to be valued at — and there was the usual clause for abating 2l. per cent. in case of loss. The sum subscribed by the company was 1,500l. On the trial of an action upon this policy, it was admitted that the ship was lost, whereby, deducting the 2l. per cent., 1,470l. was to be paid by the company, if the plaintiff made out his interest to that sum; and as the plaintiff's interest, it was admitted that he had goods on board to the value of 1,211l., and thus the premium paid to the company was 259l. 10s. 6d., which was reckoned upon the whole 1,500l. after the rate of 17s. 6d. per cent. (i. e. 16l. 6s. per cent. premium, and 10s. per cent. commission); and these two sums (viz. the value of the goods and the whole premium paid) amounted together to the sum of 1,470l. 14s. 6d., which was 14s. 6d. more than the sum to be paid upon the policy. It was agreed on all sides that the plaintiff had a right to include in his interest the premium he paid on the value of the goods; but it was made a question by the defendant, whether he should include the whole premium, as this was, there being first a premium upon that premium. But it was agreed by the Chief Justice and by several merchants, who were examined as witnesses, and by a special jury of merchants, to be the constant practice, that a person who insures his goods is entitled to include in his interest the premium not only upon the value of the goods, but also upon the sum insured; he intends to insure to his full interest, for otherwise he would not recover his whole interest, that is, he would not receive so much as his loss was, which in the present case on goods 1,211l. and premium paid 259l. 10s. 6d. (in all 1,470l. 14s. 6d.) the money to be paid by him would fall short of that sum, if the premium upon the whole 1,500l. was not to be reckoned.

24. *WALDRON V. COOMBE*. T. T. 1810. C. P. 3 Taunt. 164.

In calculating an average loss, the goods must be taken upon

The plaintiff averred a loss by perils of the sea. The defendant pleaded *non assumpsit*, and paid into court 50l. per cent. The plaintiff proved that if the goods had not been damaged the market would have afforded a profit of 15l. per cent.; that the goods were damaged, apparently by sea-water, to con-

* In an action upon a policy to recover an average loss upon goods, held to be immaterial whether the goods arrived to a profitable or bad market, for the sure way of estimating a loss was to take them at a fair invoice price; see *Dick v. Allen*, 1 Park, Ins. 167.

siderable degree; the witness would not have given 30l. per cent. for them; the invoice prices, and But the plaintiff gave no other evidence of the manner in which the damage was occasioned. To prove the amount of the loss, a witness produced a certificate from the British vice-consul of the amount for which the goods were there sold, being 9l. 15s. per cent. only of the sum insured; and the same witness swore, that by the laws of Brazil and other parts of South America, the vice consul is constituted general agent for all absent owners of goods, and that the same law authorizes and compels the vice-consul to make sale of all damaged goods of all absentees, with the assistance of two British merchants as assessors. Mansfield, C. J., admitted this evidence.

Lord Mansfield, C. J. I thought at the trial that it was very difficult to bring this within any head of evidence. It is somewhat analogous to the proceedings of courts and other public functionaries; but I know of no instances of such evidence as this being received; I dare say it would be evidence in any other country. It comes nearest to the case of judgment in foreign courts; but we receive judgments under the seals of the courts. The vice-consul is no judicial officer; he acts under a wise regulation to prevent the improper disposition of damaged goods. They are put into warehouses appropriated to them by government; the vice-consul must preside at the auction. There is no rule in the English law which makes his certificate evidence.

25. SIMONDS v. WHITE E. T. 1824. K. B. 4 D. & R. 375; S. C. 2 B. & C. 805.

The plaintiffs are British subjects, having a mercantile establishment in London, where William May Simonds resides, and at St. Petersburg, where Giles Loder resides under the permission of the Russian government. The defendant is also a British subject, and the owner of the British ship *Marshall*, which was chartered at Gibraltar on the 15th of March, 1820, by William Cosens and Co., who are British subjects residing at Gibraltar, for a voyage from Gibraltar, to touch at the Isle of Wight for orders, and then to proceed immediately, if so directed, to St. Petersburg. The vessel sailed on the voyage from Gibraltar on the 20th of March, 1820, with a cargo on board, for which bills of lading were there signed in the following form: "Deliverable at St. Petersburg, shipped in good order and well-conditioned, by William Cosens and Co., in and upon the good ship called *The Marshall*, whereof is master, for this present voyage, John White, now riding at anchor in Gibraltar Bay and bound for St. Petersburg; enumeration of the goods, and their marks, weights, &c., here follow, being marked and numbered as in the margin, which are to be delivered in like good order and well-conditioned at the aforesaid port of St. Petersburg, the dangers of the seas only excepted, unto — or assigns afterwards filled up, Messrs. W. M. Simonds and Co., the plaintiffs, or their assigns, he or they paying freight for the said goods as per charter-party, with primage and average accustomed. In witness whereof the master or pursuer of the said ship hath signed four bills of lading, all of this tenor and date, by one of which four bills of lading being accomplished the other three to stand void. Gibraltar, 18th March, 1820." John White was unknown; on the arrival of the vessel at the Isle of Wight the plaintiff purchased the cargo from the agents in London of the said William Cosens and Co., and the ship afterwards proceeded on to St. Petersburg. In the course of the voyage she struck on a reef of rocks off the Isle of Lessere, when the long boat was got out and the small bower cable and anchor were carried out, to endeavour to get her off, but the tide being strong it drifted the vessel on to the cable, which was thereby rendered useless and unfit for service. Assistance was procured, and the vessel got off; she put into Elsinore, where the master purchased a new cable. The vessel finally completed the voyage and delivered the cargo in safety under the aforesaid bill of lading. When the vessel arrived at St. Petersburg, a statement of general average on the voyage, according to the Russian laws upon that subject, was made up and settled by an officer appointed for that by the Russian government, called the *dispatcheur*. In a copy of the *dispatcheur's*, a statement was included, as a charge up-

[410] on the cargo for general average, the sum of 106*l.* 3*s.* 6*d.*, for the cost of the new cable beyond the old one, surveying the old cable, weighing and getting the new cable on board, the duty payable on the foreign cable, when brought into England, and the new cable's proportion of the above charges, which are admitted to be a general average, according to the law of Russia; and the plaintiffs were called upon to contribute to the general average so calculated; and by the laws of Russia they were obliged to pay the sum demanded, in order to get possession of the cargo. The cargo of the *Marshall* was insured by a policy effected in London, the underwriters upon which refused to allow the cable and the charges connected with it as part of the loss. On the 21st of February, 1821, the plaintiff, W. M. Simonds, wrote a letter to the defendant, demanding payment of the said sum of 106*l.* 3*s.* 6*d.* The question for the opinion of the Court is, whether the plaintiffs are entitled to recover back from the defendant the whole or any part of the said sum of 106*l.* 3*s.* 6*d.*? If the Court shall be of opinion that the plaintiffs are entitled to recover back the whole or any part, then the verdict to stand; otherwise a nonsuit is to be entered.

Per Cur. The question in this case is, whether the plaintiffs, proprietors of certain goods which were carried on board the defendant's ship from Gibraltar to St. Petersburg being compelled at St. Petersburg to pay, and paying to the defendant, in order to obtain possession of their goods, a sum of money as a contribution to a general average settled at St. Petersburg, according to the law of Russia, can recover back so much of the money thus paid as could not be charged to them on an adjustment of average according to the laws of England, the ship being a British ship, and all the parties British subjects? We are of opinion that the plaintiffs cannot recover back this money. On the part of the plaintiffs it was argued, that the case must be considered in the same way as if they were now suing for an average arising in a British port; and the authority cited was *Power v. Whitmore*. That case, however, cannot govern the present, for two reasons: 1st. Because it arose between different parties and on a different contract, namely, a policy of insurance. 2ndly. Because, in the opinion of the Court, the facts there stated did not show that the average had been adjusted according to the established law and usage of the country where the adjustment took place; whereas, in the case in which this question arises, it is admitted that the average was adjusted according to the law of the country in which it was paid. The principle of general average, namely, that all whose property is saved at the sacrifice of the property of another shall contribute to make good his loss, is very ancient, and is in universal acceptance among commercial nations. The obligation to contribute depends not so much on the force of any particular custom, as upon the general rule of maritime law; that obligation may, indeed, be limited, regulated, or even excluded, by the special terms of the contract, or by the consent of contracting parties; but there is nothing of that kind in any part of the contract between the parties in this case. There are, however, many variations in the laws and usages in different nations, as to the losses which are considered to fall within the principle of general contribution; but on one point they all agree, namely, that the place of the ship's destination, or where she carries her cargo for delivery. We believe, also, they all agree on another point, namely, that the master is not compellable to part with the possession of the goods until the sum contributable in respect of them either shall have been paid, or the payment thereof secured to his satisfaction. This appears, by the case now before us, to be the law of Russia.— This principle is laid down even by the civil law, and is noticed in the *Digest*, lib. 14. tit. 2; it is expressly stated in the *Consolato del Mare*, cap. 98; and it is alluded to by Vatin, in his *Commentary on the French Ordinance*, art. 21; and it is also recognised in several other foreign writers. If, then, the average is to be adjusted at the place of destination, by what law shall it be adjusted? One may suppose the case of a British ship carrying to a foreign port the goods of British subjects only, and delivering them to British subjects

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there; but such a case will rarely occur. Agreeing that sometimes it must, still the consignee of the goods will usually be a foreigner, and even if he be not a person of that description, the average must be taken on the usual terms; and where there are several shippers, even if all British subjects, it will, in case of jettison, be for the interest of all those whose goods are sacrificed that the master shall exercise his power of adjusting the average, in order that the expence and inconvenience of actions and suits of law may be avoided. But this cannot be done without causing the average to be adjusted at the place of destination. The wisest and most equitable may, in a particular case, be productive of inconvenience, but such occasional and partial inconveniences are a much less evil than that confusion and uncertainty which never fail to accompany a multiplicity of local regulations. For these reasons we are of opinion that the plaintiffs are not entitled to recover, and therefore the *postea* must be delivered to the defendant.—*Postea* to the defendant.

26. ROHL V. PARR. H. T. 1796. N. P. 1 Esp. 446.

In an action on a policy of insurance at and from St. Bartholomew to the coast of Africa, and during her stay and trade there, and back to St. Bartholomew, it was attempted, under a count for a loss by perils of the sea, to recover for a total loss of the ship, which appeared to have been destroyed by a species of worms which infest the rivers of Africa. An intelligent merchant swore that he had known many instances of this species of loss, but that the underwriters had invariably refused to pay. Lord Kenyon, upon this evidence, and the unanimous declaration of the jury, decided that it was not a loss by perils of the sea.

The proportion of three or five per cent. mentioned in the memorandum, is to be calculated according to the state of the cargo at the time when the loss happened.

27. BARBER V. FRENCH. M. T. 1779. K. B. 1 Doug. 294.

Action on a policy on the ship the True Blue. The counsel at the trial had begun to examine witnesses to prove the amount of an intricate average loss; but the judge thought it would be impossible to adjust a complicated action on a count of that sort at Nisi Prius. He therefore proposed that a verdict should be found as for a total loss, the plaintiff entering into a rule to account upon oath to the defendant for what he might recover of the property insured. The defendant upon this desisted from cross-examining farther, as to the particulars, value, &c.; and a verdict being found as for a total loss, the rule proposed was entered into; but the defendant being afterwards dissatisfied, moved for and obtained a rule to show cause why there should not be a new trial, on the ground that the evidence did not go to a total but only to an average loss. The plaintiff was a bankrupt, and it was now said, as an argument for making the rule absolute, that his assignees were not bound, and that the rule could not be enforced by attachment against them. This difficulty, however, was obviated, by the counsel for the plaintiff stating that the assignees would enter into any undertaking, for the purpose of making the rule binding upon them.

In an action on a policy of insurance for an average loss, if the account is so complicated that it cannot be adjusted in court, the judge, by consent of the parties, may find for a total loss, the plaintiff entering into a rule to account upon oath for what part of the insured property they may recover.

Lord Mansfield said he had often known such rules made, where the account was so complicated that it would not be taken in court, and blamed the defendant's conduct in desisting at the trial from the examination as to the particulars of the damage after the proposal by the judge, and then coming to the Court for a new trial, on the ground that there was not a total loss. He said if the plaintiff or his assignees should not comply with the rule by which they undertook to account, the defendant might apply to the Court to stay execution. The rule was discharged.

28. BIRKLEY V. PRESERVE. H. T. 1801. K. B. 1 East, 220. S. P. SIMONDS V. LODER. E. T. 1824. K. B. 2 B. & C. 805.

In *assumpsit*, the first count alleged that the plaintiffs were owners of the ship *Argo*, with the appurtenances, of the value of 677*l.* whereof G. A. was master, which ship on the 3d of November, 1799, was proceeding upon a voyage with a cargo of wheat of the value of 888*l.*; that during the voyage, part of the furniture of the ship of the value of 20*l.* was utterly lost to the plaintiffs, and other part thereof sustained damage to the value of 50*l.* which loss and damage were occasioned by certain acts of the master and crew of the vessel, properly and necessarily done by them, in order to preserve the ship and cargo.

Assumpsit lies to enforce an average contribution amongst the parties.

interested, either by the ship owner against a ship of goods, go from perishing by storm; that certain help and assistance were then and there obtained by the master in order to preserve the ship and cargo from so perishing by storm, and were then and there necessary and proper for that purpose, for which the plaintiffs were obliged to pay, and did pay 20*l.*; that the ship and cargo were, by the means used for the general preservation thereof, preserved from the storm, and completed the said voyage; of all which premises the defendant afterwards had notice; that the defendant was during the time the wheat was on board the ship as aforesaid, and at the time of the loss, damage, help, and assistance aforesaid, the owner of the wheat, and was and is benefitted, in respect thereof, by the acts of the master and crew, and by the said help and assistance, from all which respectively the loss, damage, and expenses accrued; by reason whereof the defendant, as the owner of the wheat, became liable to contribute to the said loss, damage, and expenses in a general average; and thereupon, in consideration of the premises, the defendant promises to pay the plaintiffs so much money as he, as such owner of the wheat, was liable to contribute to the said loss, damage, and expenses in a general average, when he should be thereunto afterwards requested; and the plaintiffs averred that the defendant as such owner of the wheat, was liable to contribute to the loss, damage, and expenses in a general average the sum of 40*l.*, whereof he had afterwards notice. The declaration contained two other counts; the one *indebitatus assumpsit*, for money due and payable for a general average, and the other for money paid, laid out, and expended, with the common breach to the whole. The defendant pleaded *non assumpsit*.

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Per Cur. This action is brought to recover a rateable proportion of a certain loss, damage, and expenses, which have been incurred by the plaintiffs as ship-owners, in preventing the owner of the cargo from incurring a loss. That such an action is maintainable we have no doubt; if there be not many instances of the sort to be found, it is probably because the demand has been submitted to without controversy; for we understand that this sort of damage has been continually settled as general average in the city of London. Where there is a right there must be a remedy, and there can be no other remedy than by action to recover damages. It is true, where there are many owners of the cargo, there may be as many actions brought; but that arises from the necessity of the thing; and we should still say that they are all liable to answer for their respective proportions.

19. DODSON v. WILSON. M. T. 1813. N. P. 3 Campb. 480.

Or by one shipper of goods against another, or by a shipper of goods against the shipowner. This was an action for general average by one shipper of goods against another. The declaration contained one special count, stating the facts of the case, a count *indebitatus assumpsit* for general average, and the usual money counts. Plea, the general issue.

Lord Ellenborough. Upon the general question, I am inclined to think that such an action as this may be maintained. A court of equity may, perhaps, be a more convenient forum for adjusting the claims of the different parties concerned; but if a shipper of goods which are sacrificed for the salvation of the rest of the cargo, is entitled to receive a contribution from another shipper, whose goods are saved, I know not how I can say that this may not be recovered by an action at law: this is a legal right, and must be accompanied with a legal remedy. The difficulty of showing by strict evidence, the exact amount of the contribution, is great; but as there are data upon which it may be calculated with great certainty, I think this is no objection to the action; the plaintiff by proceeding at law takes that difficulty on himself, and if he is not prepared to overcome it, he cannot succeed; nor does the multiplicity of actions which may thus be brought, appear a ground on which I can hold that relief must be sought in equity. If there is no valid objection upon principle to a particular action, I know not how I can turn round the plaintiff, by saying that an inconvenient number of similar actions may be commenced. I cannot perceive why the shipper of goods may not maintain an action at law for general average, as well as the owner of the ship. I must see, however, that this is a case in which general average can be claimed; and I am of opinion that

it is not. Is there here any thing like a *jactus mercium levande navis gratia*. A jettison to lighten the ship is not the only foundation of general average; but it must arise from that or something analogous. The distinction between general and particular average would otherwise be entirely abolished, and the shipper of goods would be called upon to contribute to losses, from which they derive no benefit, and which ought to fall exclusively on the shipowner. Here the agent of the ship arrests the person of the master, both being agents of the owner, who had undertaken to carry the whole cargo safely to its destined port: this is different from the arrest of the capt. by a foreign force; even there I am not aware it has ever been held, that the master is so inseparably united to the ship that to redeem him it is lawful to sell a part of the cargo. The process of the court of justice at Copenhagen was not directed against the ship, and was confined entirely to the person of the master; it was merely an arrest for a personal debt. I was at first struck by what was said about the second dues; and had the ship been seized for non-payment of these, I should have thought the sale of a part of the cargo to pay them, in the absence of all other means to raise money for that purpose, might have been the foundation of a claim for general average; but these dues had been paid to the Danish government by Parker, the ship's agent; and the money so paid merely constituted a private debt due to him, which he sought to recover by process against the person of the master. It comes to this, whether, if the captain be severed from the ship, whatever be the cause, he may sell a part of the cargo to redeem himself? I see no distinction between this arrest for debt and an arrest for an assault he might have committed in the streets of Copenhagen. No case has been cited, or principle advanced, to show that a claim for general average can arise from an act done to redeem the master of a ship from such an imprisonment; I therefore do not think any part of the plaintiff's goods was sacrificed for the safety of the ship and the residue of the cargo, in such a manner as to give them a right to a contribution from the other shippers of goods on board. Their proper remedy is against the owner of the ship.—Plaintiffs nonsuited.

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(U) RELATIVE TO PARTIAL AND TOTAL LOSSES.

1. CAZALET V. BARBE. E. T. 1786. K. B. 1 T. R. 187.

The evidence proved, that the defendant underwrote the policy, that the damages sustained by the ship in the voyage insured, do not exceed 48l. per cent., which sum the defendant hath paid into court. Upon pleading in this action, that when the ship arrived at the port of Lynn she was not worth repairing, the question for the opinion of the Court is, whether the plaintiffs have a right to abandon? if so, then a verdict to be entered for the plaintiffs—damages 52l. and costs 40s.; but if the Court shall be of opinion that they have not a right to abandon, then a verdict to be entered for the defendant. The counsel for the plaintiff made two points; 1st. Though a ship has gained her destined port, yet if, upon her arrival, she is so much damaged as to be unfit for future service, and not worth repairing, the insured may abandon, as in case of a total loss; and, 2nd. Whether plaintiff has a right to abandon.

A total loss is a technical expression, and imports not an utter loss in its popular sense, but a loss of the proper use for the voyage, and no more.

Per Cur. Nothing can be better established than that the owner of a ship can only abandon in the case of a total loss. The cases which have been cited went upon that ground; in the case of *Jenkins v. Mackenzie*, though the ship was brought into port, yet the capture, as between the assurer and assured was a total loss. But there is no instance where the owner can abandon, unless at some period or other of the voyage there has been a total loss. No such event has happened here; for the jury here expressly found that the loss amounted only to 48l. per cent. Even allowing a total loss to be a technical expression, yet the manner in which the plaintiff's counsel have stated it is rather too broad. It has been said that the insurance must be taken to be on the ship as well as on the voyage; but the true way of considering it is this,—it is an insurance on the ship for the voyage; if either the ship or the voyage be lost, that it is a total loss; but here neither is lost.

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2. MITCHELL v. EDIE. H. T. 1787. K. B. 1 T. R. 608.

Total losses are of two kinds; first, where the whole of the property insured perishes; secondly, where the property or some portion of it exists; but the voyage is lost if the expense of pursuing it exceeds the benefit arising from it, when the assured may abandon.

Action on a policy of insurance. The cause was ultimately referred to one of the jury, to consider what was due to the plaintiffs, who found that nothing was due; and thereupon a verdict was entered for the defendant. And now, upon a motion for a new trial, the following facts were reported: the ship was captured in the course of her voyage by an American privateer, and a few days afterwards, the captor, having stripped her of her stores and part of her rigging, and having taken out some of the hands, set her at liberty. There was a clause in the policy to exempt the underwriters from average losses under 3l. per cent. And the part of her cargo taken out did not amount to that sum. In consequence of this loss of part of the crew, it became impossible for the ship to pursue her voyage, and she was obliged to bear away to Charles Town, where she arrived on the 18th of February, 1782. She was there put into the hands of one Cruden, who was part owner in the ship, and had likewise been engaged with one of the plaintiffs in former transactions. Cruden, in June, 1782, sold the cargo, and received the whole profits of the sale, but remitted home no part of them. In his books he had given the underwriters credit for the amount. At the time of the sale he was in bad circumstances, and afterwards became insolvent. In June, 1783, Cruden came to England, and several applications were made to him on the part of the plaintiffs, by Abel, who had concerns with the plaintiffs as well as with Cruden, and who said at the trial that the plaintiffs had looked to Cruden for payment for two or three years, during all which time no notice of abandonment had been given by the plaintiff to the underwriters.

Buller, J. then stated, that the first question which had been made was, whether the plaintiffs were entitled to recover as for a total loss? And as to this, he was of opinion, that as there had been a capture, which for a time had occasioned a total loss, the owners had the option to abandon or not, as they pleased: but if they chose to abandon they ought to have done it immediately upon receiving intelligence of the loss; and that as they had not done so, but had looked to Cruden as their agent for payment, he was of opinion that they had waived their right to abandon, and could only recover as for an average loss.

[416] Another question was then made,—how far the plaintiffs were entitled to an average loss above the sum paid into court, which amounted to the difference between the produce of the sales at Charlestown and the invoice? as to which, the plaintiffs contend that they were entitled to recover from the underwriters a charge of 5l. per cent. commission on selling at Charlestown, and 5l. per cent. more for reuniting; that it had been referred to one of the jurymen to consider what was due for average, who had awarded that nothing was due. Two questions have been made in this case; 1st. Whether the plaintiffs are entitled, under these circumstances, to recover as for total loss? 2nd. Whether, under the reference to the arbitrator, he has done right in awarding that nothing is due to the plaintiffs? As to the first, I apprehend that the general rule is, that where any part of the property insured has been saved the assured cannot recover as for a total loss, unless he make his election to abandon and give reasonable notice to the underwriter of his intention. But it is contended that the assured never waive their right to abandon while they are managing in the best manner they can for the concerned; and that argument is grounded on the common clause inserted in every policy, whereby he is authorised “to sue, labour, and travail, without prejudice to the insurance.” Now this clause does not, in my apprehension, warrant the position in so large an extent as it is contended for. It seems to me that the meaning of that clause is, that till the assured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandonment; and that is reasonable, because, in general, the parties live in the country, and the loss may happen at great distance, so that they cannot exercise their judgment immediately; it is, therefore, necessary that the master, who is on the spot, should do the best he can; but I think that the assured are bound to decide, and signify their elec-

tion to the underwriters, whether they will abandon or not the first opportunity; and for this reason, that though the person who takes upon him to act on the occasion for the benefit of all concerned is not the agent of the assured, yet if, upon receiving notice of the loss, they do not elect to abandon to the underwriters, then they adopt the acts of such person, and make him their agent. This is something like the notice which is necessary to give to the drawer of a bill of exchange in case of non-payment, which, if the holder omit to do, he is considered as giving credit to the acceptor, and, therefore, the loss, if any, must fall on him. There may be cases where the previous acts of the master may not make him the agent of either party, and he only acts in common for them both, till notice is received by the parties at home. If after such notice he is continued in his agency, he becomes the agent of the party by whom he is confirmed; but he cannot be considered as the agent for the underwriters till notice has been given to them, and they have had an opportunity of exercising their discretion, whether they will or will not continue him; though, till notice of the loss was first received by the assured, the property continued at the risk of the underwriters. Here it is plain, that during the course of near three years Cruden was considered by the assured as their agent; credit was given to him in that character; frequent applications were made to him for payment; and till his insolvency there was no appearance of any intention to disown him; that was the first moment when the assured thought of abandoning. As to the second ground of objection, the reference to the arbitrator was to determine what was due for average. Now, supposing that, instead of saying that nothing was due, he had said, that 4l. 5s. per cent. was due; it could not have been contended that he had done wrong. This is precisely the same thing; for so much has already been paid into court, and there is nothing more due. This is right in substance; and there seems to be no grounds for the Court to grant a new trial for his inaccuracy in point of form, especially when they see that strict justice has been done between the parties.

3. MILLES v. FLETCHER. T. T. 1779. K. B. 1 Doug. 231.

This was an action on a policy of insurance on the ship the Hope, and her freight, from Montserrat to London. The plaintiff went for a total loss; the defendant insisted that he was only entitled to recover for an average loss.—The jury found a verdict for a total loss; and upon a motion for a new trial, and the facts of the case appeared as follows: The ship when proceeding on her voyage was captured on the 23rd of May, by two American privateers, who took the captain all the crew and part of the cargo, which consisted of sugars, out of her; the rigging was also taken away. She was afterwards retaken, and carried into New-York, where the captain arrived on the 23rd of June, and taking possession of her found that part of what had been left of their cargo was washed overboard, that fifty-seven hogsheads of what remained was damaged, and that the ship was leaky, and in such a state that she could not be repaired without unloading her entirely. The owners had no store-houses a New York, where the sugars could have been put while the ship was repairing, nor any agent there to advise or direct the captain. No sailors were to be had; the only method he had of paying the salvage, which amounted to the value of forty hogsheads of sugar, was by sale of part of the cargo of the ship. The captain did not know of the insurance. If he had repaired the ship his expenses would have exceeded the freight by more than 100l.—There was an embargo on all vessels at New York, till the 27th of December, and by the destination of his ship she was to have arrived at London in July. Under these circumstances he consulted with his friends at New York, and resolved, upon their opinion, and his own, to sell the ship and cargo, as the most prudent step for the interest of his employers. The cargo was accordingly sold and paid for, the ship was also contracted for, but the person who had agreed to buy her ran away, and the captain left her in a creek near New-York, and returned to England, where he arrived in the February following, and gave the plaintiff notice of what had been done, which was the first information he received of it; and the plaintiff immediately claimed as for a

If the voyage is lost or not worth pursuing, and the salvage is high; if further expense is necessary, and the underwriters will not at all events undertake to pay that expense, the loss is total, and the insured may abandon, notwithstanding a recapitulation.

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total loss from the underwriters, and offered to abandon. Lord Mansfield told the jury that if they were satisfied the captain had done what was best for the benefit of all concerned they must find as for a total loss.

[418] Lord Mansfield. The great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be precisely known. I took great pains in delivering the opinion of the Court in the cases of *Goss v. Withers*, see 2 Burr. 683; and *Hamilton v. Mendes*, see Burr. 1198. I read both of those cases over last night, and I think that from them the whole law between insurers and insured, as to the consequences of capture and recapture, may be collected. Whenever a question of law arises at *Nisi Prius*, I propose a case or grant one, when asked for by the counsel, and I avoid as much as possible blending fact and law together, having seen the inconvenience of it in *Poole v. Fitzgerald*. But on the trial of this cause it did not appear to me that there was any question of law, and no case was asked for. It was impossible to ask for one till the facts were ascertained; and when they were it would have been impossible to state them in any way which could have left a doubt on the law. It was not contended that a capture necessarily amounts to a total loss, as between insurer and insured; nor, on the other hand, that on a capture and recapture there may not be a total loss, though there remain some material tangible part of the ship and cargo. Neither was it contended that the captain has an arbitrary power by his act to make the loss either partial or total, as he pleases. A great deal has been said about what the Admiralty could or would have done in such a case in order to pay salvage. As to that, if no owner appeared, they would condemn the whole; but if they saw from the ship's papers that there was one, they would not if there were different claimants of the ship and cargo; they would leave it to them to say what part should be sold, and if they differed in opinion, would order the sale of such part as would be attended with the smallest loss. But all that is foreign to the present question, which is simply this, whether the consequences of the capture were such as, notwithstanding the recapture, occasioned a total obstruction of the voyage or only a partial stoppage, as in the case of *Hamilton v. Mendes*. In that case, and in *Goss v. Withers*, great stress was laid on the situation of the ship and cargo at the time when the insured had notice, at the time of the offer to abandon, and at the time of the action brought. No cases say that the bare existence of the bulk of the ship prevents the loss being total. In *Hamilton v. Mendes* it is laid down that if the voyage is lost or not worth pursuing, if the salvage is high, if further expense is necessary, if the insurer will not at all events undertake to pay the expense, &c. the insured may abandon, notwithstanding a recapture. Here, at the time of the capture there were no hopes of a recovery, no friend's ship in sight, no means of resistance; all the crew was taken out, and part of the cargo, and the rigging also taken away. Afterwards the ship was retaken, and brought into New York; when she was brought there is still continued a total loss. Neither the insured nor the insurers had any agent in the place. The Court of Admiralty must have proceeded *secundum æquum et bonum*, and might have sold her for the benefit of those concerned. When the insured first had notice, and offered to abandon, which was when the captain came to England, and when the action was brought it was still a total loss. The voyage was abandoned, the cargo sold, and the ship left to be sold. The only answer the defendant makes, or can make, to this is, that the loss was total indeed, but that the captain made it so by his improper conduct; for that on his taking possession of the ship the loss became partial, and that he ought to have pursued the voyage. But is this defence true in fact? The captain, when he came to New York, had no express order, but he had an implied authority from both sides to do what was right and fit to be done, as none of them had agents in the place; and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within his contract of indemnity. Suppose there had been no insurance, what ought the captain to have done? As to the cargo (according to

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the course of the voyage, the ship should have arrived in London in July), on the capture, part had been taken out, some was washed overboard, fifty-seven hoghead damaged, and the whole, from the leakiness of the vessel, in a perishable state. There were no store-houses, nor could the ship proceed in the state she was in; the crew were gone, and an embargo laid on till December. What! shall a cargo which was intended to arrive at London in July, be kept in a perishable state at New York, in a leaky vessel, till 2nd of December? As to the ship, it was certainly better to sell her than to bring her to London. There was no crew belonging to her, and she had no cargo. Even if all the cargo had been left, the expense of repairs would have exceeded the freight. If she had been brought home, the expense of bringing her might have been more than what she would have sold for in London. It has been said that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy, for that circumstance goes to determine it to be the interest of the insured to abandon the voyage. The point is, what did the owner suffer by the capture? And it appears that he suffered so much that it was not worth while to pursue the voyage; the whole voyage was lost. As the captain did not know of the insurance, he had no temptation give the turn of the scale to one side or the other. I left it to the jury to determine whether what the captain had done was for the benefit of the concerned; if they had found that it was in words, where would have been the question of law?—Rule discharged.

4. *FORBES v. ASPINALL* H. T. 1811. K. B. 13 East, 323.

Motion for a new trial in an action upon a policy of insurance, "at and from any port or ports in Hayti, to Liverpool," &c., on freight, valued at 6,500*l*. The ship had sailed from Liverpool to Hayti, with a cargo intended for barter; had bartered away part of her outward cargo, and had taken fifty-five bales of cotton in part of her return cargo; and was proceeding from one port in Hayti to another, viz. from Jacquemet to Du Cayes, to barter away her outward cargo, and to complete her lading home, when she met with an accident by the perils of the seas, which occasioned a total loss.

Per Cur. If the plaintiff's be only entitled to a satisfaction for a partial loss, that satisfaction has already been made, and a nonsuit should be entered. But the plaintiffs contend that, as this was a valued policy, and as part of the goods to be carried upon the freight insured were on board at the time of the loss, they are entitled to claim their verdict for a total loss. Freight is the profit earned by the ship owner in the carriage of goods on board his ship; and an insurance upon freight is an insurance made in order to secure that profit of the shipowner, in case he is prevented by any of the perils insured against from actually earning such profit. An insurance upon freight has no reference to the hull of the ship, or to its outfit for the voyage; both of which are protected by insurance upon the ship; but its sole object is to protect the assured from being deprived, by any of the perils insured against, of the profit he would otherwise earn by the carriage of goods. To recover, therefore, in any case upon a policy on freight, it is incumbent on the assured to prove that, unless some of the perils insured against had intervened to prevent it, some of the freight would have been earned; and, where the policy is open, the actual amount of the freight which would have been so earned limits the extent of the underwriter's liability. In every action upon such a policy evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight; and in another case, if the policy be open, the sum payable to the shipowner for freight, together with the premiums of insurance and commission thereupon, is the extent to which the underwriters are chargeable. In this case, therefore, as there was no contract under which the shipowner could claim freight but for goods actually shipped on the homeward voyage, the assured could have made no claim, had this been an open policy, but to the extent of the actual freight on the fifty-five bales of cotton which were

That the insured in a valued as well as in an open policy on goods may recover as for a total loss, the whole subject matter intended to be covered by the valuation in the policy must have been lost,

shipped for this country, and of the premiums and commission thereon. The question then is, whether it makes any essential difference that this is the case of a valued policy? And we are of opinion, upon full consideration that it does not. The object of valuation in a policy is to fix, by agreement between the parties an estimate upon the subject insured, and to supercede the necessity of procuring the actual value, by specifying a certain sum as the amount of that value. In fixing that sum, if the assured keep fairly within the principle of insurance, which is merely to obtain an indemnity, he will never go beyond the first cost in the case of goods, adding thereto only premium and commission, and, if he think fit, the probable profit; and in the case of freight, he will not go beyond the amount of what the ship would earn, with the premium and commission; thereupon the valuation, however in the case of goods, looks to all the goods intended to be loaded, and, in the case of freight, it looks to freight upon all the goods the ship is intended to carry upon the voyage insured; and if by the perils insured against in a valued policy on goods, part only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of that part; and so, if by the perils insured against the freight of part only of the goods to be carried be lost, the assured can only recover in respect to that loss, according to the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation. The proposition is monstrous; instead of confining the policy, as it ought to be confined, to a contract as nearly as may be of indemnity against what may be lost in respect of freight by the perils insured against, it converts it into a contract of indemnity against a different class of accidents, which may operate to prevent the assured, from being able to procure a full cargo upon freight, and may make it the interest of the assured, which it never ought to be, that a loss should happen. The Court, therefore, will look for very strong authorities before they yield to such a proposition. It was pressed, upon the argument, that in the case of a valued policy if any interest be proved to be on board, and there be no fraud, a total loss will entitle the assured to recover the sum specified in the valuation; and to that position we accede, with this limitation, that is, provided there is a total loss by any of the perils insured, of the whole subject-matter of insurance to which the valuation applied, viz. of all the intended cargo of goods, where the insurance was on goods, and of all the intended freight, where the insurance was upon freight. But if it be meant to carry that position to this extent, that the underwriter is not at liberty to require what was intended to have been included in that valuation, or, when he has ascertained that point, that he cannot reduce the sum below the valuation, by proving that a part only of what was included in the valuation, has been lost by a peril insured against, we deny the position when so extended. In *Show v. Felton*, 2 East, 109, which has been strongly relied upon, the interest of the assured was in ship and outfit, including provisions and sea-stores laid in for slaves and wages advanced to the crew; and the chief ground insisted upon for opening the policy was this, that the principal part of the provisions had been consumed in the voyage, and therefore had not been lost by the perils insured against. But that ground was resisted with effect, because the subject insured was to be considered as of the value ascribed to it when the voyage commenced; and if the diminution of the provisions was to be allowed to reduce the extent of the underwriter's liability upon the policy, every valued policy upon a ship would be to be opened; because, every day after the voyage commenced, the quantum of the ship's provisions would be proportionably reduced.

5. *BULLER v. CHRISTIE*. H. T. 1814. K. B. cited 2 M. & S. 374.

If goods reach their place of destination, not on the ship in which they are insured, but in another, having been removed

This was an insurance on 1950 boxes of soap on board the *Young Peter*, at and from Liverpool to Oporto. The defendant paid into court 20 per cent. upon his subscription. The ship, in attempting to pass the bar, in order to get into the harbour of Oporto, ran aground without the bar and there bulged. The water flowed in and wetted that part of the soap, and ran towards the bottom of the hold; but out of the 1950 boxes, only 17 were totally lost, the rest were saved and carried ashore in barges, and delivered into the warehouses

of the assured; and it appeared that they had sustained from the sea-water a loss not exceeding 20 per cent. The counsel for the assured contended that the loss was total, inasmuch as the ship had never arrived, but before arrival became totally lost; and that the circumstance of the goods having reached their destination, and the hands of the consignees, would not vary the case. On the other side it was insisted upon the necessity of an abandonment; but Lord Ellenborough, C. J. held it a total loss without abandonment.

6. DAVIDSON v. WILLASEY. E. T. 1813. K. B. 1 M. & S. 313.

A ship was chartered from Liverpool to Jamaica, there to take on board a full cargo for Liverpool at the current freight, to be paid at one month from the discharge of her cargo at Liverpool; and the shipowners effected a valued policy on the freight at and from Jamaica to her port of discharge in the United Kingdom; and the ship arrived at Jamaica, and after taking on board one half of her cargo was lost by storm, the remainder of her cargo being on shore and ready to be shipped. The Court held that the insured were entitled to recover as for a total loss.

7. BAILLIE v. MONDIGLIONI. H. T. 1769. K. B. Park, Ins. 70.

This was an action on a policy of insurance on goods at and from Nevis to Bristol. The ship sailed from Nevis, but before her arrival at Bristol she was captured and taken into Morlaix, and there condemned. An appeal was lodged in the Parliament of Paris, where the sentence was reversed, and the ship and cargo were decreed to be restored. Before the sentence of restitution, ship and cargo had been sold, but the money was paid, the charges of prosecuting the appeal being deducted. The defendants have paid all the charges of the suit, and the salvage, except the sum now in demand, which was paid by the plaintiffs as owners of the goods to the owner of the ship for freight, *pro rata itineris*, and for which freight this action is brought on the policy on goods. After time taken to deliberate,

Lord Mansfield delivered the unanimous opinion of the Court for the defendants. The item now in litigation, his lordship said, is that which was paid for freight by the owner of the cargo to the proprietor of the ship, *pro rata itineris* for it. As between the owners of the ship and cargo, in case of a total loss, no freight is due; but as between them no loss is total where part of the property is saved and the owner takes it to his use. In this case the value of the goods was restored in money, which is the same as the goods; and therefore freight was certainly due, *pro rata itineris*. But as between the owners of the goods and the underwriters upon the cargo, the latter have nothing to do with the freight. The owner of the ship has a lien for his freight; but in a total loss, literally so called, no freight is due. In case of a loss, total in its nature, with salvage, the owner of the goods may either take the part saved, or abandon; but in neither case can he throw the freight upon the underwriters, because they have not engaged to indemnify him against it.

8. BARKER v. BLAKES. H. T. 1808. K. B. 9 East, 283.

Per Cur. A loss of the voyage, with due notice of abandonment, operates as a total loss of the goods.

9. ANDERSON v. WALLIS. M. T. 1813. K. B. 2 M. & S. 240. S. P. HUNT v. ROYAL EXCHANGE ASSURANCE COMPANY. E. T. 1816. K. B. 5 M. & S. 47.

Policy of assurance on goods (copper and iron) at and from L. to Q., war-

* A chartered ship is to take in goods at London for Madeira, there deliver such portion as an agent should direct, receive on board wine, proceed to Jamaica, and there deliver; 1851, to be paid for freight during the whole voyage from London to Madeira, and thence to Jamaica, payable in Madeira on delivery of the goods shipped at London for that place; buy wine at so much per pipe, to be carried to Jamaica free of freight; she arrives at Madeira, delivers all her London cargo, except a certain portion retained as ballast, receives part of the Jamaica cargo, but not the freight wine, and then is lost; this was holden a total loss; see *Atty v. Lindo*, 1 N. R. 236.

† Where a ship and goods are insured for a voyage, if the former be taken and recaptured, and, after the recapture, the captain, acting for the benefit of his employers, sells the ship and cargo, and thereby puts an end to the voyage, the insured may abandon and recover as for a total loss; see *Miles v. Fletcher*, Doug. 221.

The assured in a valued policy is entitled to recover for a total loss, where the part of the cargo ready on shore is lost.*

When the object of the voyage is lost, there is a total loss as to the cargo, though the ship is safe.†

A loss of the voyage, with due notice of abandonment, operates as a total loss of the goods.

The disappointment of the arrival

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anted free of particular average; and the ship owing to some damage in the course of her voyage, was obliged to run into port and undergo repair, and some part of the goods were damaged; and the repairs detained her so long as to prevent her reaching Q. that season, and no other ship could be procured at that or a neighbouring port to forward the cargo in time, so that the voyage was abandoned, and the ship afterwards sailed on another voyage.

Per Cur. The question is, whether this was a total loss of the cargo, under all circumstances, or only an average loss? for if the latter, as the underwriter is free from particular average, the plaintiffs are not entitled to recover. The plaintiffs were allowed to take a verdict at the trial, subject to a motion by the defendant. In this case the loss in fact was an average loss, by the damage arising from the sea-water to the iron and nails for the space of five or six weeks, during which they were on board. The copper was not injured at all, and the iron and nails not to any considerable extent. The ship was under a temporary disability, though the means of repairing were no doubt easily attained at so commodious a harbour as Kinsale, and it does not appear that the necessary repairs could not have been done before March. However, it appears that she could not be repaired in time for her voyage to Quebec that season. The voyage is made in about seven or eight weeks, and in November the river St. Lawrence becomes frozen, so that Quebec is inaccessible by ships by the 28th of November. It does not appear that any extraordinary pains were used by the captain to get another ship; it is stated, indeed, that there were none at Kinsale or Cork. This then is a case where there was not an actual loss of the cargo or the ship, but only of the voyage for that season; and the question is, whether such a loss amounts to a total loss of the cargo by reason of the abandonment? Assuming that the case of *Manning v. Newham*, Marsh. Ins. 585. was well decided, and that a total loss would be recoverable for a cargo insured, as in that case, free of particular average, and situated under the same circumstances, it may be observed, that there the ship had received an irreparable damage, as it is stated in the report, which drove her back to Tortola, where only two ships could be had, both together not capable of taking the cargo on board; so that that case is widely different. The damage to the ship is there stated in terms to be irreparable; that distinguishes it; for here not only was the damage not irreparable, but it appears it could be, and was, repaired in a few months. In that case, the cargo became in effect extinct; the ship longer subsisted, nor could it be conveyed at all in any ship; here the cargo was capable of being conveyed after a delay of a few months only in the very same ship. The only description of loss, therefore, capable of sustaining an abandonment, so as to convert what was in fact an average into a total loss, is a temporary suspension of the voyage. But what case has ever yet decided that such a temporary retardation is a good cause of abandonment, so as to amount to a total loss? Disappointment of arrival is a new head of abandonment in insurance law. If, wherever a disappointment were to arise, an abandonment might be made; then supposing this ship had sailed on her voyage, but had not arrived in the river St. Lawrence until the frost set in, and was consequently obliged to wait there until the next season, that would have been a cause of abandonment according to this rule. It would be a loss of the voyage which the assured had in contemplation. So, if the retardation of the voyage be a cause of abandonment, the happening of any marine peril to the ship, by which a delay is caused in her arrival at the earliest market, would be also a cause of abandonment. I am well aware that an insurance upon a cargo for a particular voyage contemplates that the voyage shall be performed with the cargo, and any risk which renders the cargo permanently lost to the assured may be a cause of abandonment. In like manner, a total loss of cargo may be effected not merely by the destruction of that cargo, but by a total permanent incapacity of the ship to perform the voyage; that is a destruction of the contemplated adventure. But the case of an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure, and throwing the bur-

then on the underwriters. It is unnecessary to pursue the subject further, as there is not any case nor principle which authorises an abandonment, unless where the loss has been actually a total loss or in the highest degree probable, at the time of abandonment. This rule, therefore, for a nonsuit, must be made absolute.

10. *PARSONS V. SCOTT*. E. T. 1810. C. P. 2 Taunt. 363. S. P. *FALKNER V. RITCHIE*. H. T. 1814. K. B. 2 M. & S. 290.

A vessel chartered to Oporto, St. Ube's, and Gottenburgh, being taken at Oporto by the enemy, was liberated on payment by the master of a sum of money, and on condition of his bringing home in her to England English prisoners, to be exchanged for an equal number of French. Upon the news of the capture, but after the time of the ship's liberation, the owners abandoned the ship to the insurers. Upon her arrival at Portsmouth the captain refused to deliver her, unless on re-payment of the ransom, which the owner refused. The Court held, that the owner being entitled to retake his ship, which he saw safe at Portsmouth, the loss of the voyage did not enable him to recover upon a policy on the ship as for a total loss; nor could he recover, as for an average loss, the sum which had been paid by the master for the ship's ransom, and which, being an illegal payment, the plaintiff was bound to repay to the master.

11. *IDLE V. ROYAL EXCHANGE ASSURANCE COMPANY*. H. T. 1818. C. P. 8 Taunt 755; S. C. 3 Moore, 115. S. P. *MEABURNE V. LOCHIE*. E. T. 1824. K. B. 4 D. & R. 207. S. P. *CAMBRIDGE V. ANDERTON*. E. T. 1824. K. B. 2 B. & C. 691. *ROBERTSON V. CLARKE*. H. T. 1824. C. P. 1 Bing. 445. *VAN OMERON V. DOWICK*. H. T. 1809. N. P. 2 Campb. 42. *JOSEPH V. KNOX*. H. T. 1810. N. P. 3 Id. 320. *WILSON V. MILLAR*. M. T. 1816. N. P. 2 Stark. 1.

The ship sailed from Quebec, and on her voyage down the river St. Lawrence sprung a leak; it became necessary, for the preservation of the lives of the master and crew, to run her on shore. She took the ground on the outside of a reef of rocks, and was there fixed and exposed to the full force of the stream, and in the way of the drift ice, then forming and floating down the river. One of the part owners and agent for the others resided at Quebec, and after two surveys, in which the surveyors stated as their opinion that it would be prudent to sell the ship and cargo, the master, under the direction of such part owner, sold the same. The ship, however, survived, was repaired by the purchasers, and afterwards brought a full cargo to London. In an action on the policy against the underwriters on freight for a total loss, the Court held, first, that under the circumstances the master was warranted in selling the ship and cargo; and secondly, that an abandonment of freight was unnecessary.

12. *BARKER V. BLAKES*. H. T. 1808. K. B. 9 East, 283.

This was an action on a policy of insurance, dated the 4th of August, 1803, on a quantity of oil belonging to an American proprietor, shipped on board an American ship, the *Hannah*, on a voyage to and from New York to Havre de Grace.

Per Cur. The whole amount of loss claimed on the part of the plaintiff is 45*l.* 2*s.* 8*d.*, consisting of 20*l.* 19*s.* the freight and expenses paid under the sentence of the Court of Admiralty, and 24*l.* 3*s.* 8*d.*, the difference, we presume, between the invoice value of the oil in America, and the proceeds of the sale here. The defendant contends, that the plaintiff is at any rate not entitled to recover the latter item of loss, his claim thereto being merely founded on an abandonment, which was not made, as the defendant insists, in due time. But he further contends, that the plaintiff cannot by law recover at all, even to the extent of the average loss of his freight and expenses, under this policy; and that, to allow of such a recovery, would be to allow of an indemnity being afforded, through the medium of British insurance, to neutrals acting in contravention of the interests and policy of Great Britain, in the carrying of the goods of its enemies; that in so doing, the neutral had, in effect,

violated the duties of his neutrality, and assumed a hostile character in respect of this country. But it does not appear to us that the general objection to the plaintiff's right to recover is well founded. In order to entitle himself to recover as for a total loss, the plaintiff must establish two things: 1st. That a loss of the voyage, the only description of loss which can be contended for in this case, as the goods themselves have been ordered to be restored, and are capable of being so, was occasioned by the detention in question, which continued until and after the blockade took place, which rendered the prosecution of the voyage to Havre no longer practicable. 2ndly. Supposing a loss so occasioned to be a total loss by denison, within the policy, that the abandonment of the goods was made in due time. And thinking, as we do, that the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged detention of the ship and cargo, may be properly considered as a loss of the voyage, and such loss of voyage, upon received principles of insurance law, as a total loss of the goods, which were to have been transported in the course of such voyage, provided such loss had been followed by a sufficiently prompt and immediate notice of abandonment; we are of opinion, however, upon the authority of the cases in 7 East, 451; 4 East, 401; that this abandonment, which was made on the 14th of October, 1803, above five weeks after the blockade of Havre had been publicly notified, the latest event to which the loss of voyage is liable of being referred, was not made within those reasonable and convenient limits of time which the law allows for this purpose; and it is to be observed, that no excuse for the lateness of the abandonment is offered, on the score of any want of competent powers in the parties making the abandonment, as they do not appear to have been furnished with any other powers for this purpose at last than what they must be supposed to have originally possessed, if they ever had any. The loss in question must, therefore, for want of a timely notice of abandonment, be regarded merely as an average loss, and the verdict must of course be restricted to the sum of 20*l.* 10*s.*, the amount of the freight and expences, to which the assured was subjected by the sentence of the Court of Admiralty. Judgment for that sum, and no more, must be given accordingly.

13. *GOLDSMID V. GILLIES*. E. T. 1813. C. P. 4 Taunt. 803.

Where the consignee of a captured cargo was allowed to retain the amount of his acceptance, held that the assured, not having abandoned, might consider the loss partial, and therefore, what was saved for his benefit.

The plaintiffs having obtained a licence from the British government for the voyage, shipped coffee at London, upon their own account, on board the *Margaretha*, and consigned it to Messrs. Baur, their agents, at Tonnigen, to sell upon commission. Upon the credit of this consignment the plaintiff had drawn bills to the amount of 31,761 marks banco, or 2,400*l.*, upon Messrs. Baur, which they accepted, and at maturity duly paid. Immediately upon the arrival of the vessel at Tonnigen, and before any part of the coffee was landed, it was seized by the Danish government, and afterwards confiscated. The government ordered coffee to be sold by Messrs. Baur, and compelled them to give security to account for the proceeds. A sale was soon afterwards effected, the gross proceeds of which amounted to 69,139 marks banco, and the net proceeds to 57,125 marks. Upon an application made by Messrs. Baur, to the Danish government, stating that they had before the seizure accepted bills to the amount of 31,761 marks banco, upon the credit of the consignment, they were permitted to reimburse themselves by retaining that sum out of the net proceeds, and were ordered to pay over the residue, viz. 25,364 marks, into the Danish treasury on account of the government, and which was accordingly done. The invoice price of the coffee in England was 2,720*l.*; the defendant, after advice of the seizure, adjusted a loss of 35 per cent. upon account. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover from the defendant the 44*l.* 16*s.* for which the verdict was taken, or any and what other sum? If the Court should be of opinion that the money paid into court covered the whole that the plaintiffs were entitled to recover, a verdict was to be entered for the defendant.

Per Cur. If the plaintiff had brought an action after this salvage for the

total loss, the defendant would have nonsuited him for want of an abandonment. We do not state that upon seizure by the Danes or Swedes, the plaintiff might not sue for a total loss without abandonment, but after the restoration no abandonment has been declared; in the meantime, that which was for a time a total loss became an average loss, and then all that is restored is for the benefit of the assured, not of the underwriter; the plaintiffs could not recover from the underwriters more than 100 per cent., but they may receive *undequaque* more than 100*l.*—Judgment for the plaintiff.

14. THORNELY V. HEBSON. E. T. 1819. K. B. 2 B. & A. 513.

The plaintiffs are agents of Townsend and White, merchants in New York, who effected the policy in question on the ship, valued at 1,200*l.*, which was subscribed by the defendant for the sum of 200*l.*, and Townsend and White were interested in the ship to the valued amount. The ship, properly manned and equipped, sailed soon afterwards in ballast on the voyage insured; after leaving Hull she struck on a sand-bank, and put into Dover to be repaired; sailed from Dover on the 19th of December, 1816, and proceeded on her voyage. Nothing of much importance occurred after the vessel left Dover, except the continual succession of heavy gales from the westward, the ship straining and making much water, until the 14th of February, 1817, when, blowing a very severe and heavy gale from the south-west, it was discovered that the vessel's mainmast was badly sprung. The gale continued to the 15th, when the fore-yard and fore-sail were carried away, and the fore-topsail was torn to pieces by the gale, and the bowsprit was discovered to be badly sprung. During these days, and until the crew left her, she leaked so as to require one pump to be constantly going; and owing to the injury which the vessel had sustained by the seas and tempest during the said voyage, and to the fatigue which the crew had consequently undergone, the crew were no longer able to navigate her. On the 16th of February, 1817, the crew of the William discovered two vessels, and made a signal of distress. In a few hours the two vessels bore down to the William, and proved to be two brigs, one called the Hyder Ali, and the other the Navigator. The masters of both these brigs promised to keep by the William till the ensuing morning, and then each of them would take on board of respective ships one-half of the crew, but during the night a heavy gale separated the William from the Navigator. On the 17th of February, the brig Hyder Ali was still in sight of the William, and the crew of the William went on board the Hyder Ali; but, in consequence of the heavy seas then running, they were only able to remove from the William their provisions and clothes, and when the crew left the William, they were so worn out with fatigue that they could not be mustered on deck, to the pumps, or to make what sail then remained; the crew of the William so left her upon the unanimous opinion of the whole crew, after a consultation amongst the master, mate, and mariners, and for the preservation of their lives. Notwithstanding the state of the William, and the continued violence of the weather, eight fresh men from the Hyder Ali, which said brig had many American seamen passengers on board, volunteered to go on board of the William in the hope, at the risk of their lives, of bringing her into port; and the said men were permitted by the captain of the Hyder Ali to go on board of her, and the two vessels shortly afterwards separated. The Hyder Ali arrived at New York, with the late crew of the William, on the 4th of March, and then the ultimate fate of the William being unknown, the particulars of her misfortunes, as hereinbefore related, were communicated to Messrs. Townsend and White. They on the 8th of March, being the first opportunity of sending a letter to Liverpool, after the arrival of the Hyder Ali at New York, wrote to the plaintiffs, their agents, at Liverpool, directing an abandonment to be made to the underwriters of the vessel, and this letter was received by the plaintiffs in Liverpool on the 17th. On the 18th of April, in pursuance of these directions, the plaintiffs gave notice of abandonment to the defendant; but the defendant refused to accept it, as intelligence had arrived in England (as the fact was) that the men from the Hyder Ali had succeeded

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in bringing the *William* into Newport, a port in Rhode Island, about 200, miles from New York, and from whence, had she been refitted and repaired, she might easily have proceeded to New York, independent of the proceedings in the Admiralty Court aftermentioned, but where she lay, with the knowledge of the said Townsend and White, subject to a claim for salvage. The *William* arrived at Newport on the 10th of March, 1817, and was immediately libelled by the salvors in Rhode Island, in the Admiralty Court for salvage; and being claimed by the late master, professing to act on behalf of the underwriters, but not having their particular authority, and which claim was known to Townsend and White, the Court decreed her to be sold, and one-half of the proceeds to be paid to the salvors, with costs; and she was accordingly sold for 315*l.*, and the salvors were paid thereout the amount decreed to them, and costs, and the balance (about 112*l.* 10*s.*) now remains in the court. The present action was commenced on the 19th of November, 1817; previously thereto the defendant had paid the plaintiffs the partial loss.

Per Cur. The plaintiffs rely upon two circumstances, in order to constitute this a total loss: the first is the desertion of the ship by the crew; and the second, the sale at Rhode Island. Now, where a ship is captured, she is taken possession of by persons adversely to the owner, and so it is in the case of barratry; but here the ship was taken possession of by persons acting, not adversely, but for the joint benefit of themselves and the owners, and the latter were never dispossessed of the vessel. The desertion of the crew, therefore, does not amount to a total loss. Then, as to the second point, the sale, in order to constitute a total loss, must have been found to have been necessary, and wholly without the fault of the owners. Now, here a ship, originally worth 1,200*l.*, is sold for 315*l.* only. It appears that the owners were near enough to have acted in the business at the time. If they had exerted themselves, and were unable to raise money, in order to release the ship and put her into a proper state of repair, the sale might have been necessary; but in the absence of any proof of such exertion we cannot say that we think it was so. It is a very beneficial rule, and consistent with the meaning of the policy, for the Court to say that the assured cannot abandon so as to make it a total loss, unless they have exerted the utmost of their power to prevent the necessity for it. On both grounds, therefore, we are of opinion, that there [429] must be judgment for the defendant.

15. *DIXON v. REID.* E. T. 1822. K. B. 5 B. & A. 597.

Where a ship and cargo was barratrously taken out of her course by the crew, and the ship and part of the cargo sold, and the remainder sent home by another vessel, held that this was a total loss of the cargo from the time of the committing the act of barratry. A rule nisi had been obtained, calling on the plaintiff to show cause why the underwriters should not be allowed the amount at which that part of the cargo which arrived in London had been valued by the policy, subject to the charges thereon, together with the sums paid out of the proceeds of the ship and cargo at Barbadoes, for wages, &c.; and why so much as the said two sums should amount to should not be paid by the assured to the underwriters out of the money paid over to them; or why, in default thereof, the consolidation rule should not be opened and a further trial be had. The following facts now appeared upon the affidavits: The ship received on board at Sierra Leone 233 logs of timber, being about 260 loads, and sailed from thence on her voyage on the 8th of March, 1808, but was barratrously taken by the crew to Barbadoes, where she arrived on the 28th of April, and the ship was condemned and sold, and 27 logs of timber were also sold to pay the charges incurred there, and the remaining 186 logs were forwarded to London by another vessel, which arrived in August, 1820. The insured abandoned to the underwriters. Upon the arrival of the 186 logs in this country, the market price of timber being then 10*l.* or 11*l.* per load, the plaintiff proposed to settle the loss upon that part of the cargo at 69*l.* 9*s.* 6*d.* per cent. The underwriters not consenting to it at the time, the market prices of timber afterwards fell; and the 186 logs were, on the 27th of April, 1821, sold (but not by the plaintiffs) at the rate of about 6*l.* per load; and the loss actually paid by the underwriters on the cargo amounted to 93*l.* 12*s.* 6*d.* per cent.

Per Cur. Here, by the fraud and barratry of the master and mariners, the

cargo was taken out of the possession of the assured. From that time it became to them a total loss. The payment of the wages at Barbadoes, and the sending home the 186 logs, were not acts of the assured or of any person authorised by them. We think, therefore that this was a total loss and not an average loss, and consequently this rule must be discharged.

16. *TYSON V. GURNEY*. M. T. 1780. K. B. 3 T. R. 477.

The defendant when he subscribed the policy knew the plaintiffs and where they respectively resided. The plaintiffs are natives of America, are now subjects of the American states, and at the time of effecting the policy were merchants and partners, but during the American war preserved their allegiance to the King of Great Britain, and were subject to all the disabilities imposed on such persons by the American states. At the time of effecting the policy, the plaintiff Tyson was on his passage from Amsterdam to St. Eustatia, where he afterwards, and at the time of the capture of the ship and goods in question, resided, and was established in business as a merchant, and where he continued to reside until the capture of St. Eustatia; and in consequence of such capture, and of the general confusion which prevailed in this and the other West India islands, he shortly afterwards removed with all his property to the Danish islands of St. Thomas, in the West Indies, where he continued to carry on business in the same manner as in St. Eustatia, till the end of the late war, when he removed to Philadelphia, in America, where he now resides. The other plaintiff, Pleasants, at the time of effecting the policy, resided and now resides at Philadelphia or elsewhere, in America; but during the late war he was prosecuted, and banished from Philadelphia by the American states, for his strict adherence to the cause of Great Britain; and before the time of effecting the policy (the situation of affairs having taken a turn in favour of the American states, and rendered his banishment any longer unnecessary) he was permitted to return to Philadelphia. The goods insured were the property of the plaintiffs, and were shipped at London on board the *New Content* for Amsterdam, where on the ship's arrival, they were unloaded and reshipped on board the *Carolina Aletta*, bound to St. Eustatia, consigned to the plaintiffs. That ship at the time of sailing was a neutral ship, but during her voyage hostilities commenced between Great Britain and Holland, and she was captured by an English ship of war, and carried into St. Kitts. The ship and cargo were condemned on the 24th of February, 1781, by the Vice-Admiralty Court of St. Kitts, as lawful prize. No claim was made by the plaintiffs in the Vice Admiralty Court for the goods insured, though claims were made in that court by the British subjects, resident in St. Kitts, for different parts of the cargo; and on the 14th day of April, 1781, on a further hearing, the goods so claimed were adjudged not liable to confiscation, and were delivered to the claimants. When the defendant was applied to by the plaintiff's agent, on account of the loss, the defendant desired that he would wait the event of a cause then depending. The case then stated a proclamation by the King in council in December, 1780, authorising the Lords of the Admiralty to grant letters of marque and reprisal to seize all ships and goods belonging to the States General of the United Provinces, or their subjects, or to any other inhabitants within any of the countries, territories, and dominions of the States General, and to condemn the same.

Per Cur. The words of the act of parliament are, "that all ships of or belonging to the inhabitants of the said colonies, together with their cargoes, apparel, and furniture, and all other ships whatsoever, together with their cargoes, which shall be found trading in any port or place of the said colonies, or going to trade, or coming from trading, in any such port or place, shall become forfeited to his Majesty, as if the same were the ships of open enemies." Now the cargo in question was neither on board an American ship or any other ship trading to any port in the colonies, and therefore it is not within this act of parliament. The legislature did not think proper to declare that the property of Americans should be forfeited, unless it were found on board an American vessel or on board some other vessel trading to one of their ports; and the

If property insured be taken and condemned as prize, the underwriters are liable, though no claim be made by the assured.

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An assured, by doing what is best for the interest of all concerned with the property saved, does not thereby preclude himself from recovering for a total loss, if otherwise entitled.

The sentence of a court of appeal reversing a condemnation, under which the property insured had been landed and sold and decreeing a restitution, or the value, does not make the loss partial.

On a loss by seizure and detention or bartray, if the insured be afterwards indemnified by a restoration in the whole, or in part, they cannot recover for a total loss, unless notice of a abandonment be given by them when the loss happened.*

property of Americans found in any other part of the world is not forfeited by this act. There is no pretence for the construction put on this statute by the defendant's counsel. The two first points were very properly abandoned.

17. *PLANTAMOUR v. STAPLES*. H. T. 1787. K. B. 1 T. R. 611.

This was an action on a policy of insurance on the ship *Dura*, at and from Marseilles to Madeira, the Cape, and the Isles of France and Bourbon, and to all parts and places where and whatsoever in the East Indies and Persia, or elsewhere, beyond the Cape of Good Hope, from port to port and from place to place, and during her stay and trade to all ports, and places until her safe arrival back at her last port of discharge in France, upon any kind of goods; also upon the body, &c. of the ship.

Per Cur. There is not a particle of doubt. The only question is, whether the shipping to Europe was necessary to the salvage? It is admitted that the defendant is liable upon the voyage to Pondicherry, though the goods were conveyed in another ship, therefore, that circumstance makes no difference. The sale of the cargo is also admitted to have been necessary. Then how were the proceeds to be remitted to Europe? What was the best way of getting home the money for the benefit of the insured and the insurers? Beyond all doubt the best way was to invest it in other goods; therefore, that being done which was the best that could be done, the insurers are liable.

18. *MULLETT v. SHEDDEN*. H. T. 1811. K. B. 13 East, 304. S. P. *MEL- LISH v. ANDREWS*. H. T. 1812. K. B. 15 East, 13. S. P. *BOUDRETT v. HEULIGG*. M. T. 1815. K. B. Holt, N. P. 149; S. C. 5 B. & A. 597.

An American, properly licensed to export saltpetre from Calcutta to America, having insured the vessel for the voyage; the ship was seized by the captain of a British ship of war at the Cape of Good Hope, and the cargo condemned, unshipped, and sold, by order of the Court of Admiralty there, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the captor's costs. The Court held that the assured might recover as for a total loss, without notice of abandonment, the thing insured being wholly lost to the owner by the unshipping and sale of the commodity at the Cape, under the order of the court there; and that such loss was recoverable against the underwriters on a count alleging it to have happened by the unlawful seizure and detention of a British ship of war. However questionable it might have been, if notice of abandonment had been necessary, whether such notice, if not given till after the receipt of a second letter from the Cape, announcing the condemnation, landing, and sale of the goods, were in time, when a prior letter of advice had stated the seizure and detention, on which no notice had been given; and held that the court of appeal allowing the captor his costs on the reversal of the sentence of condemnation did not the less show the original seizure and detention to be unlawful, as alleged in the count.

19. *M'MASTERS v. SHOOLBRED*. M. T. 1724. N. P. 1 Esp. 237.

In an action on a policy for six months, where the ship had been captured, and carried into Charlestown, sold by the captors by authority of the French consul there, and purchased by the captain for account of the original owners. On the question whether this was to be considered as a partial loss, or that the owners could abandon?

Lord Kenyon was of opinion that the captain was agent for the owners, as recovering the vessel upon their account, and paying a kind of salvage, the amount of which would be the loss sustained, and which only constituted an average loss. His lordship, however, admitted, that when the ship had been captured and carried into port in the enemy's possession, the assured at that period might have abandoned; but not having done so till the vessel was recovered, they could now only go for an average loss.

* Where, in the case of shipwreck, a part of the goods perished in the waves, and the residue, though got on shore, was destroyed and plundered by the inhabitants of the coast, this was holden a total loss by perils of the sea, without notice of abandonment; see *Boudrett v. Henligg*, 7 Term Rep. 149.

20. COLOGAN v. LONDON EXCHANGE ASSURANCE COMPANY. M. T. 1816. When only a very small proportion of the goods insured is saved, and that upon the condition of their not proceeding to the intended place of destination! but to some other port, in such a case the insured may abandon, and recover for a total loss.

Insurance at and from Quebec to Teneriffe, on a cargo of wheat, fish, and stores, with the usual memorandum as to corn and fish, free from average, unless general. The ship was captured, and afterwards recaptured, and sent by the recaptors to Bermuda, where, a scarcity prevailing, an embargo was laid on the export of provisions; and the cargo being landed, it was found that 585 bushels of wheat were so damaged by sea-water, that they were, by order of magistrates, for the sake of the public health, thrown overboard; and other parts of the wheat being damaged, the captain sold that part of the fish which sold at a profit, and put up the ship to sale, which he purchased at not more than one-fourth of its value, for the benefit of the owners; and having received permission to take the remaining wheat to Teneriffe, he directed it to be sold, and purchased it for the benefit of those concerned; and by leave of the governor, the embargo being then raised as to the West India islands, shipped the same for Madeira, where he arrived, and delivered it, and took in a cargo of wine for London, with which he arrived. The Court held, the assured might recover for a total loss.

21. BAINBRIDGE v. NEILSON. M. T. 1808. K. B. 10 East, 323.

The defendant had subscribed two policies, one on ship, and the other on freight of the same ship, on a voyage from London to Liverpool, to Jamaica. The ship was captured on the 21st of September, and recaptured on the 25th, after which the plaintiff, having received intelligence on the 30th of the capture, but not of the recapture, gave notice of abandonment on the 31st, which he persevered in after the 6th of October, when news of the recapture arrived, and that the ship was safe in a port in Ireland, but which notice the underwriters did not accept. And it appeared, that instead of a total loss, there had been only a small partial loss of 12*l.* and a fraction for salvage and charges on the policy on freight, and 15*l.* and a fraction on the ship and policy, and that no damage whatever was sustained by the ship while in the possession of the enemy. The question was, whether that which in the result turned out to be only a partial loss to a trifling extent, should, because of the notice of abandonment given when a total loss appeared to exist, be recovered as a total loss. The Court were of opinion, that they must look to the real nature of the contract in a policy of insurance, which was nothing more than a contract of indemnity, and consequently, as that which was supposed to be a total loss at the time of the notice of abandonment first given had ceased, and as only a small part had been incurred in the salvage, that was the real amount of the indemnification which the plaintiff was entitled to receive under this contract of indemnity.

Lord Ellenborough observed, that it has been said in argument, that the offer to abandon having been rightly made at the time, a right of action vested in the assured, which could not be defeated by the subsequent events; but that proposition is not only not true in the whole, but it is not true in its parts. The effect of an offer to abandon is truly this—that if the offer appear to have been properly made upon certain supposed facts, which turn out to be true, the assured has put himself in a condition to insist upon his abandonment; but it is not enough that it was properly made upon facts which were supposed to exist at the time, if it turn out that no such facts existed, or that other circumstances had occurred which did not justify such abandonment. It may be said to be properly made upon notice received, and *bona fide* credited, by an assured of his ship having been wrecked, whether such intelligence were true or not and though the letter conveying it turn out to be a forgery; and yet clearly no right of action would vest in him, founded upon an abandonment made upon false intelligence, and without any thing, in fact, to warrant the giving of such notice. What is abandonment more than this—that the assured, having had notice of circumstances, which, if true, entitle him to treat the adventure as a total loss, he, in contemplation of those circumstances, casts a desperate risk on the underwriter, who is to save himself as he can? But does not all this

presume the existence of those facts on which the right accrues to him to call upon the underwriters for an indemnity? And if they be all imaginary, or founded in misconception; or if at the time it had ceased to be a total loss, and there be no damage to the assured, or at least if the only damnification arise out of the very act (the recapture) which saves the thing insured from sustaining a total loss, the whole foundation of the abandonment fails.

22. *PATTERSON v. RITCHIE*. M. T. 1815. K. B. 4 M. & S. 393.

Where, after notice of abandonment had been given, a recapture took place, and the goods arrived at their place of destination, with the exception of a part, which was sold to pay the salvage and another part, which had been plundered and lost in consequence of the capture and recapture, the underwriters were held liable only for a partial loss, although by reason of the capture the voyage was delayed till the following season.

On the 4th of August, 1813, the plaintiff, who had chartered the ship *Dispatch*, on a voyage to Quebec, shipped on board her at Liverpool the goods insured, consisting of 31 puncheons of rum, 120 tons of salt, and a quantity of coals and mats, of which he was owner, for Quebec, to be delivered to certain persons there, for the shipper's account. On the 10th of August, the ship sailed with her cargo on the voyage insured; and on the 27th of September was captured by an American privateer, of which capture some of the crew of the *Dispatch* brought intelligence to the plaintiff at Liverpool, on the 13th of October; and on that day the plaintiff communicated the facts of the capture and arrival of the crew to the underwriters, and offered to abandon to them his interest, and demanded payment of a total loss; but the underwriters refused to accept the abandonment or pay. On the 27th of October the ship and cargo were recaptured by an English privateer, and carried to Halifax for adjudication, where eleven puncheons of rum were sold in order to pay the salvage on the recapture of the goods; afterwards, in May, 1814, the ship with the remaining goods were sold for the account of those concerned; but it was discovered that owing to the capture and recapture, 188 gallons of the rum and 23 tons of the salt had been plundered and were lost. In the ordinary course, the ship and cargo ought to have reached Quebec in October or November, 1813; and it was from the causes above stated, and from the freezing of the river St. Lawrence, which sets in November, and does not leave the river navigable until April, that they did not arrive at Quebec till the May following. The salvage and charges on the goods amounting to 209*l.* were paid out of the proceeds of the sales at Halifax and Quebec, the nett proceeds of which, after payment of such salvage and charges, amounted to 573*l.*; whereas, if the goods which were sold at Quebec had reached their destination in October or November, instead of the May following, when the market was declining, they would have netted 559*l.* more. The defendant paid to the plaintiff, without prejudice, the difference between the valued amount and the produce of the rum sold at Halifax; also the value of the rum and salt plundered and lost, and also the 209*l.* paid for salvage and charges on the recapture, which payments covered the plaintiff's loss, if it was a partial loss, otherwise, if the plaintiff was entitled to recover for a total loss; and this was the question for the opinion of the Court.

Per Cur. The point now made is that at the time of abandonment, and that this being once vested is not done away by subsequent events. In *McIver v. Henderson*, there had been at one time a total loss, and circumstances went to show that this totality had never ceased; for the captain was obliged to deposit a sum of money by way of bail, and never had entire restitution. *Bainbridge v. Neilson* was, we believe, determined upon the authority of *Godsal v. Boldero*, which underwent much consideration, and was founded upon the doctrine of Lord Mansfield in *Hamilton v. Mendes*; and although Lord Eldon is said to have spoken with dissatisfaction of *Bainbridge v. Neilson* in the House of Lords, we confess, with all deference, we are unable to see any good reason for receding from that judgment. The principle of that and the other decision is a general one, and is this: we have a right of action for non-payment of money. The party pays us before action brought; that takes away our right of action.

23. *WILSON v. FORSTER*. H. T. 1815. C. P. 1 Marsh, 425; S. C. 6 Taunt.

25.

When a ship is seized and condemned by a foreign

The plaintiff was sole owner of the ship *Agatha*, which sailed from Liverpool with a cargo of goods on freight, bound to Pillau, on the 24th of September.

ber, 1810. In the course of the voyage, the ship, after sustaining considerable damage, arrived in Pillau roads on the 10th of November, 1810, and the next morning sailed into Pillau harbour, where she was immediately, with her cargo, seized and taken possession of by the officers of the Prussian government. The master had not afterwards any command over the vessel, nor was he able to use any means to recover possession of her until she was repurchased by him at the public sale by auction, held by the Maritime Court at Pillau, on the 1st of April, 1811, for the sum of 552 rix dollars, where she was delivered to him, and he was then at liberty to sail with her in any direction he thought fit, and he had the command of her in the same manner as before the seizure. He stated in his evidence, that to his judgment the most advantageous course that could be taken for his owner was to recover possession of the ship by paying the said money at the auction, on which occasion he considered himself acting as the owner's agent. The vessel was not then in a seaworthy state, or capable of prosecuting her voyage in the Baltic, or of returning to Great Britain; and the master, having taken possession of her, caused her to be repaired and rendered seaworthy; after which he navigated her safely home to the port of London, where she arrived in August, 1811. The owner had notice of her arrival; and the master held her there, for and on account of the owner, and was ready to have delivered her up to him or his agents, if he had been required so to do; and the owner might then, if he had thought fit, have had possession of the ship, in a perfectly safe and seaworthy state. A bottomry bond had been given by the master at Pillau, for the money with which he repurchased the ship, the amount of which the owner refused to satisfy; and it was in consequence put in suit in the Admiralty Court here, and the vessel was taken possession of by the marshal of that court. On the 2nd of December, 1812, a decree of sale was made in favour of the holder of the bottomry bond, and on the 21st of January following a commission of sale issued, in pursuance of which the ship was sold by public auction, and the proceeds thereof, and the homeward freight, were paid over by the registrar of the Admiralty Court to the holder of the bottomry bond, under the decree. It was admitted that the plaintiff was entitled to a total loss on the freight.

Per Cur. As the case now stands it appears that there has been an unlicensed seizure, and the master has purchased the vessel of those who had no right to condemn her. The question, therefore, is, whether he has not bought her with a bad title, and whether, if the insured chose to take possession of her, the master could have resisted him? We are of opinion that the plaintiff was entitled to the possession of her, and if that be the case, he is only entitled to recover the expense incurred in the purchase and repair of her.

24. *LIVIE V. JANSON. T. T. 1810. K. B. 12 East, 648.*

In an action on a policy on ship and goods, warranted free from American condemnation, it appeared that the ship and goods were damaged by the perils of the seas, and were afterwards seized by the American government and condemned. It was holden, that the total loss by subsequent seizure and condemnation took away from the assured the right to recover, in respect to the previous partial loss by sea-damage, inasmuch as the immediately operating cause of total loss was one from which, and its consequences, the underwriter was by express provision in the policy exempted; and as the other antecedent causes of injury never produced any pecuniary loss to the plaintiff; and as there never existed a period of time, prior to the total loss, in which the assured could have practically called on the underwriter for an indemnity against the temporary and partial injury.

(O) RELATIVE TO ADJUSTMENT.*

1. *AMERY V. ROGERS. M. T. 1794. N. P. 1 Esp. 207.*

Insurance on the ship Dart, from St. Kitts to London, in which the defendant was insured, and the ship was lost, and the cargo was damaged. When an average loss is settled, the broker concerned in general procures the amount to be indorsed on the policy, and signed by the insurer, which is called the adjustment. It is prima facie evidence against the insurer, without the production of any other proof of the loss; *Beawas, 310; 2 Selw. N. P. 969; 4 Esp. 289.* It does not require a stamp; *Weebe v. Simpson, 2 Selw. 917.*

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state, and purchased by the master on behalf of his owner, the owner can only recover as for a partial loss, for the property in the ship is not divested out of him. [435]

An insurer may be liable for a partial damage under the policy, although, eventually a cause of a total loss occurred, which was excepted from its operation. [436]

When an entire insurance is effected on ship and cargo, and no cargo is shipped, the

insurer, in adjusting the loss, is only liable for such a proportion of the sum insured as the property upon which the policy attaches bears to the whole.

To an action on a valued policy it affords no defence to prove that the insured have received the amount from the underwriters in another policy, if the subject matter insured is proved to

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be of a value equal to the sum received and ought to be recovered.

The value of the goods is to be estimated according to the invoice price; an insurer is not liable for the rise or fall of the market;

Or for a loss that may arise from the difference of exchange.

ant had underwritten 200*l*. The plaintiff had written from St. Kitts to his agent in London, to effect a policy on ship and cargo to the amount of 5,500*l*. calculating the ship at 1,500*l*. of that sum. No goods were ever loaded on board. Lord Kenyon, though he at first doubted, afterwards adopted the rule which the special jury assured him was established at Lloyd's coffee-house for settling losses of this kind, namely, that as the policy on the cargo never attached, the assured was only entitled to recover such a proportion of the sum which the defendant had underwritten as the property on which the policy attached bore to the whole.

2. *BOUSFIELD v. BARNES*. T. T. 1815. N. P. 4 Campb. 228.

Action on a policy of insurance. The defendant's counsel contended that this action could not be maintained, as the plaintiff had already received the full amount of the sum at which the ship was valued by the policy on which the action was brought. The plaintiff was estopped to say to the underwriters on this policy, that the ship was worth more than 6,000*l*., and, therefore, by receiving that sum, he was fully indemnified; *Godsall v. Boldero*, 9 East, 72.

Lord Ellenborough. I think the valuation in this policy is only conclusive in settling a loss upon it between the assured and the underwriters who have subscribed it, without taking into consideration what has been transacted between the assured and third persons. If a total loss happens, these underwriters shall not pay more than the amount of the valuation; and if there be a partial loss, the valuation regulates the amount of the average contribution. I will likewise take care that the assured do not recover upon the whole more than the real value of the subject-matter insured. But I think it is not enough for the underwriters on a particular policy to show that the assured has received from another quarter the amount of the valuation in that policy, unless this amounts in point of fact to a complete indemnity.

3. *LEWIS RUCKER*. E. T. 1760. K. B. 2 Burr. 1170. *ROBINSON v. EWER*. H. T. 1786. K. B. 1 T. R. 130. S. P. *JOHNSON v. SHEDDON*. T. T. 1802. K. B. 2 East, 581. *USHER v. NOBLE*. T. T. 1810. K. B. 12 Id. 639.

Per Lord Mansfield, C. J. "A valued policy, is not to be considered as a wager-policy, or like interest or no interest. If it were it would be void by the fact of 19 Geo. 2. c. 37. The only effect of the valuation is fixing the amount of the prime cost just as if the parties had admitted it at the trial; but in every other argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant to have an indemnity. If it be undervalued the merchant himself stands insured for the surplus. If it be much overvalued it must be done with a bad view, either to gain, contrary to the 19th of the late king, or with some view to a fraudulent loss; therefore, an insured can never be allowed to plead in a court of justice that he has greatly overvalued, or that his interest was a trifle only. It is settled that upon valued policies the merchants need only prove some interest, to take it out of 19 Geo. 2 because the adverse party has admitted the value, and if more were required, the agreed valuation would signify nothing. But if it should come out in proof that a man had insured 2,000*l*. and had interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination that by such an evasion the act of parliament may be defeated. There are many inconveniences from allowing valued policies; but where they are used merely as a cover to a wager they would be considered as an evasion. The effect of the valuation is only fixing conclusively the prime cost. If it be an open policy, the prime cost must be proved; in a valued policy it is agreed." For this reason I must hold that a valued policy is not void by the statute of the 19 Geo. 2.

4. *THELLUSSON v. BEWICK*. M. T. 1793. N. P. 1 Esp. 77.

Assumpsit to recover the amount of the defendant's subscription to a policy of insurance on ninety-four casks of sugar. The sugars had been shipped on board the ship *Ami*, from Havre to Ostend. She sailed from Havre, but had not proceeded far on her voyage when the loss took place, with the benefit of

salvage to the underwriters. The policy had been underwritten in September, 1791; the exchange then was at 24*d.* on the French crown of three livres, soon after which the loss happened. Part of the cargo was saved, and sold at three months' credit, and of course was to be paid for in January, 1792. Before the several payments were made by the underwriters, the exchange on the French crown of three livres had fallen successively from 24, as it stood at the time of making the policy to 15 and 73-4ths, at which rate the underwriters were ready to pay. For the plaintiff it was contended, that the payment should be at the rate of 24*d.* on the French crown of three livres; that a policy of insurance was a contract of indemnity; and that unless the payment was at that rate, that he would not stand indemnified under the policy. [438]

Lord Kenyon said, that nothing was clearer than that the insurers did not insure against the debasement of the coin; that the question therefore of the rise or fall of exchange was entirely in this respect out of the province of the jury to decide on in the present question; that in case the exchange had risen, the insured would have had the benefit of the rise; and, therefore, in case of a fall, should submit to the loss.

5. JOHNSON v. SHEDDON. T. T. 1802. K. B. 2 East, 581. S. P. HURRY v. ROYAN EXCHANGE ASSURANCE COMPANY. M. T. 1802. C. P. 3 B. & P. 308.

Justice Lawrence began judgment by declaring that the loss is to be estimated by the rule laid down in *Lewis v. Rucker*, 2 Burr 1167, that the underwriter is not to be subjected to the fluctuation of the market; that the loss for which alone he is responsible is the deterioration of the commodity by sea-damage; and that he is not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. The parties agreed that the damage was to be ascertained by considering whether the commodity was a third, a fourth, or a fifth worse; and it was also agreed, that that could only be done by ascertaining the price at the port of delivery. But the only question was, whether that price was to be ascertained by the net proceeds, or by the gross produce; but the Court held, that the calculation was to be made on the respective gross proceeds of the same goods when found and when damaged, and not on the net proceeds. The main stress of the argument in favour of the judgment is this,—that by taking the net proceeds as the basis of the calculation, instead of the gross proceeds, it will happen that where equal charges are to be paid on the sound and damaged commodity, the underwriter will be affected by the fluctuation of the market, which he ought not to be. Thus, suppose sound goods, including all charges, sell for 600*l.*, the damaged for 300*l.*; let the charges on each be 100*l.*; the difference after they are deducted, will be 300*l.* or three-fifths. But let the goods come to a fallen market, with the same degree of deterioration; let the sound sell for 300*l.*, and the damaged for 150*l.*, and deduct the charges as before; the net proceeds of the one will be 220*l.*, the other 50*l.*; so the underwriter will in this case have to pay three-fourths. But, as the deterioration is the same in both cases, the underwriter should pay the same, whatever be the state of the market, which he will do if the gross produce be taken, namely, half the valued or invoice price. Another consequence of taking the net produce will be, that the underwriter will be made responsible for a loss not arising from the deterioration of the commodity by sea-damage, but for that loss which the assured suffers from being liable to pay the same charges on the sound and damaged commodity. This will be illustrated by the case put of two ships arriving with the same commodity equally damaged, one being subject to duties and charges, and the other to none; the degree of deterioration being the same, the underwriters should pay alike in both cases. Suppose then the cargoes to be deteriorated one-half, and the demand and the state of the market the same, and that the goods, if sound, And the rule for calculating a partial loss on goods by sea damage is to estimate the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds.* [439]

*When a ship, partially damaged, has been repaired by the owner, the practice is to deduct one third for the cost of repairs, in consideration of the benefit which the owners derive from new materials in lieu of the old; see 1 Ry. & M. 378; 5 M. & S. 13.

would sell for 1000*l.*, but, being damaged, for 500*l.*, and the charges for 200*l.* On those goods where no charges are to be paid the insurer will have to pay one-half, or 50*l.* per cent. The goods where charges are to be paid, being equally good with the other, will sell for the same sum, and when 200*l.* are deducted for charges, will, in one case, leave a net produce of 800*l.*, in the other of 300.; and thus, if the underwriters were to pay according to this calculation, he would pay five-eighths or one-half; not because the one cargo has suffered more than the other by the sea, for the supposition is that the sea-damage is the same in both, but from the commodities of unequal value being subjected to equal duties and charges.

6. PALMER V. BLACKBURN. M. T. 1822. C. P. 7 Moore, 339; S. C.

1 Bing. 62.

In the case of a freight policy, a usage that the loss shall be calculated upon the gross amount, and not upon the net value of the freight, is legal.

The ship *Juliana*, bound from the East Indies to London, was totally lost just before the termination of her voyage. The freight payable to the plaintiffs, in the event of the safe arrival of the ship, would have been 3068*l.*; but out of this the plaintiffs must have paid 699*l.* 9*s.* for seamen's wages, pilotage, light dues, tonnage duty, and dock dues, from which payment they were altogether exempted by the loss of the vessel. The defendant contended that the plaintiffs were entitled to recover from the insurers, not the amount of the gross freight, but only the amount of the net freight, after deducting the charges which the plaintiffs must necessarily have incurred had the ship arrived in safety; and he paid into court sufficient to cover his proportion of the amount of the net freight. The plaintiffs persisted in demanding the amount of the gross freight, and called merchants of thirty and forty years experience, at Lloyd's, who concurred in stating, that though open policies on freight were extremely rare, the uniform custom in settling losses upon them had been to pay the assured on the amount of the gross freight. To the admission of this evidence the defendant objected on the ground that it proposed to establish the existence of a custom contrary to law, a policy of insurance being a contract, the object of which was to secure to the assured a bare indemnity; whereas a usage such as the present would secure to him a profit on, and operate as inducements to, the loss of the ship. The learned judge having admitted the evidence, subject to future discussion on the point, the defendant called witnesses nearly equal in number and experience, who stated that they were not aware of the existence of the usage detailed by the plaintiff's witnesses.

Dallas, C. J. The evidence in support of the usage was as strong as possible; the evidence on the part of the defendant only of a negative character; and I put it to the jury to consider whether the usage was so notorious as to imply a knowledge of it in the parties to the action, and so to form a part of their contract. But the defendant's counsel contends that, admitting the existence of the usage, it is contrary to law—contrary to the very principle of a policy of insurance, as being no more than a contract for indemnity—opening a wide gate to fraud, and hence that in law it cannot be supported. Without giving any opinion on the subject, I think the point of considerable importance, and worthy of further consideration.

If it is established that an agent had authority to sign a policy for an underwriter, it follows that he had authority to adjust it.

7. RICHARDSON V. ANDERSON. M. T. 1807. N. P. 1 Campb. 43.

Action on a policy of insurance. Loss by capture. The subscription of the policy by defendant's agent was admitted; and a witness proved the signature of the same agent to an adjustment on the policy as for a total loss.

Lord Ellenborough. If an agent has authority to subscribe a policy he may also adjust it; and here, as you have admitted the agent's subscription to the policy, and that he was authorized to subscribe it, you are bound to admit that he had authority to sign the adjustment. See 16 East, 386.

8. AREL V. POTTS. M. T. 1803. N. P. 3 Esp. 242.

Where, by a memorandum on the policy the underwriter was to The ship was taken by the French and carried into Guadaloupe, where the colony being in want of her cargo they took it out, and compelled her to take in a cargo of the produce of that island, with which she sailed. She was afterwards captured on the 20th of September, 1793, by a British ship; and carried into Nevis, where the cargo was condemned. There was a memorandum on

the policy, that the loss was to be adjusted within three months after advice of the ship being captured. The defendant relied on the circumstance that he had had no notice of the loss of the ship. The broker who effected the policy was called; he could prove no direct notice having been given to the defendant, but said he had no doubt that notice had been given.

Le Blanc, Justice. As to the first point made by the defendant's counsel, it does not strike me that the communication of the loss should necessarily come from the assured; I think that if the underwriter had notice by any means of the loss of the ship, that this would satisfy the memorandum of the policy. With respect, therefore, to the evidence of notice, it is this: there is evidence that the loss of this ship was publicly known, that she stood on Lloyd's books as a capture, and that the defendant was a subscriber to Lloyd's, and in the habit of daily examining the books. Was the defendant the only underwriter in Lloyd's coffee-house ignorant of the capture? In addition to this, there is the evidence of the broker, who swears that he believes the defendant had notice, though he cannot speak to it in direct terms. I think this evidence sufficient to go to the jury.

9. **CHRISTIAN v. GOOMBE.** T. T. 1806. N. P. 2 Esp. 489. S. P. **STEEL v. LACY.** M. T. 1810. C. P. 3 Taunt. 285.

Case on a policy of insurance on ship and goods from London to Shelborne, in Nova Scotia. The policy had been adjusted by the defendant, at fifty per cent. and it was contended that he was now bound by that adjustment. On the other hand, it was argued that the adjustment was not binding; and that if it were it ought to have been declared upon specially.

Lord Kenyon said that he did not think it necessary to declare on the adjustment specially; that it was *prima facie* evidence against the defendant; but if there had been any misconception of the law or fact upon which it had been made, the underwriter was not absolutely concluded by it. This turned out to be the case; and therefore there was a verdict for the defendant. See 8 Taunt. 124; 6 Taunt. 159.

10. **DE GARRON v. GALBRAITH.** T. T. 1795. K. B. 1 Park, 163.

The plaintiff went to trial, having no other evidence to produce but the adjustment; and the witness who proved it swore that doubts, soon after they had signed it, arose in the minds of the underwriters, and they refused to pay; upon which Lord Kenyon said, that under these circumstances the plaintiff must go into other evidence, which not being prepared to do he was nonsuited. In the following term a motion was made to set aside the nonsuit, upon the ground that an adjustment was *prima facie* evidence of the whole case, and threw the *onus probandi* upon the underwriters; and that it amounted to no more than a proof the underwriter's subscription to the policy.

Lord Kenyon. I admit the adjustment to be evidence in the cause to a certain extent; but I thought at the trial, and still think, that when the witness who proved the signature of the defendant to the adjustment said that doubts, soon after the adjustment took place, arose in the minds of the underwriters as to the honesty of the transaction, and they called for further proof, the plaintiff should have produced other evidence; and that shutting the door against inquiry after an adjustment, would be putting a stop to candour and fair-dealing amongst the underwriters.—Rule refused.

11. **REYNER v. HALL.** H. T. 1817. C. P. 4 Taunt. 725.

A ship was insured, warranted free of capture in port. A letter, announcing her capture, stated it to be in port; on which the underwriter and the assured adjusted; the former returned, and the latter received back, the premium. It afterwards appeared that the capture was not in port. The Court held that the assured was precluded by the adjustment and repayment from recovering on the policy, whether the underwriter's name had been struck off the adjustment only, or off the policy also.

* Nor is the insured allowed to bring it forward by surprise; 3 Taunt. 285.

† An adjustment is not in any case conclusive; its effect, when regularly made, is merely to transfer the burden of proof from the insured to the insurer; *Steel v. Lacy*, 3 Taunt. 285.

adjust a loss in three months after notice, a direct notice from the assured is not required, if he has had notice by other means.

Fraud, or mistake, or [441] a misconception on the part of the underwriter, in validates an adjustment signed by him.

So, where the underwriter, immediately after signing the adjustment, expresses doubts as to the loss, and requires further proof;

So, on the other hand, an adjustment is not binding on the insured if it proceeds from a mistake of the facts on his part;†

12. HERBERT v. CHAMPION. M. T. 1807. N. P. 1 Camb 134.

Hence it follows that an underwriter is not estopped by an adjustment,

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The ship sailed from the Downs, under the convoy of the *Fury*, sloop of war, on the 12th of December, 1805, for Portsmouth, and before her arrival there was captured by a French privateer. The defence was, that a letter from the captain, dated the 5th of December, stating that he was to sail under convoy of the *Fury*, though received on the 6th of that month, had not been communicated to the underwriter before effecting the policy, which was not till the 12th or 13th of January; all that the broker had then said having been that the ship had sailed about three weeks. This letter, it is now contended, would have induced them to make inquiries whether the *Ganges* had reached Portsmouth, and would have shown her to have been a missing ship. To this two answers were given on the other side: 1st. The defendant, on the 12th of March, 1806, after reading the letter in question, together with several others subsequently written by the captain while a prisoner at Verdun, and giving a full account of all the circumstances of the case, had adjusted the policy as for a total loss, and put his initials on the back of it, which is considered tantamount to an order for the money. 2ndly. It was denied that the letter of the 5th of Dec. was at all material to be communicated.

Lord Ellenborough, C. J. expressed a clear opinion, that an adjustment is merely an admission of the supposition of the truth of certain facts stated; that the assured are entitled to recover; and although it is incumbent on an underwriter who has once admitted his liability by an adjustment, to make out a strong case, yet, until actual payment of the money, he may avail himself of any defence which either the facts or the law of the case will furnish.

13. SHEPHERD v. CHEWTER. H. T. 1808. N. P. 1 Camb. 274.

Although at the time of signing it he had the means of rendering himself acquainted with the history of the voyage, and the mode of loss, if his attention was not then drawn to the circumstances which he afterwards learned, by which the policy was avoided.

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An adjustment may be given in evidence, without being stated specially in the declaration.*

After a total loss and adjustment for freight within a month, and whilst the

Assumpsit on a policy of insurance. The plaintiff gave in evidence an adjustment on the policy, signed by the defendant, and proved that, previously to its being signed, an account had been posted up at Lloyd's Coffee-House, which the defendant must have seen, stating that the ship on her way had chased every thing she saw, and had been at last captured in the gut of Gibraltar. The defendant, when he signed the adjustment, said it was not likely the ship should have been lost by cowardice, when the captain was killed in the engagement. On the part of the defendant it was proved that the ship, from the time of her sailing from Liverpool, had been in the constant habit of cruising for prizes; and, therefore, it was contended, on the authority of *Laurence v. Sydebotham*, 6 East, 45, and *Pierse v. Anderson*, 6 East, 202. that she had been guilty of a deviation, which discharged the underwriters.

Lord Ellenborough, C. J., observed that the adjustment was *prima facie* evidence against the defendant; but it certainly did not bind him, unless there was a full disclosure of the circumstances of the case, unless they were all blazoned to him as they really existed.

14. ROGERS v. MAYLOR. T. T. 1720. K. B. 1 Park, Ins. 163. S. P. CHRISTIAN v. COOMBE. E. T. 1778. K. B. 2 Esp. 489.

Case on a policy of insurance on ship and goods from London to Shelborne, in Nova Scotia. The policy had been adjusted by the defendant at fifty per cent., and it was contended that he was now bound by that adjustment. On the other hand it was argued that the adjustment was not binding; and that if it were, it ought to have been declared upon specially.

Lord Kenyon said, that he did not think it necessary to declare on the adjustment specially; that it was *prima facie* evidence against the defendant; but if there had been any misconception of the law or fact upon which it had been made, the underwriter was not absolutely concluded by it. This turned out to be the case; and there was a verdict for the defendant.

15. JELL v. PRATT. H. T. 1817. N. P. 2 Stark. 67.

Action on a policy of insurance. Total loss, adjustment 100l. per cent. The plaintiff paid the insurance brokers their demand for effecting insurance, &c. At the time of the adjustment the policy was in the hands of the broker.

* An adjustment may be either absolute or conditional; *Gammon v. Beverly*, 8 Taunt. 89; *S. C.* 1 Moore, 562.

The defendant's initials were struck out of the adjustment, to indicate payment to the broker; and the defendant's account with the broker was debited to the loss. This was done before a month had elapsed, which is the usual time of calling on the underwriter to pay. The broker had been ordered by the plaintiff to pay over the money to one Splidt. Notice had also been given to the defendant before the month had elapsed to pay the money to Splidt.

Lord Ellenborough said, he had not the least doubt on the question. The principal is never estopped from demanding the money, unless there is actual payment to the broker or credit given.—Verdict for the plaintiff.

payment, and the broker debited the insurer with the loss, the insurer is liable to the insured.

16. *TANNO V. EDWARDS*. T. T. 1810. K. B. 12 East, 488.

Goods insured upon a valued policy, having been seized, confiscated, and sold, by order of the enemy's government on their own account; but the necessary documents to verify the loss not having arrived here, the underwriters, on application to pay their subscriptions, agreed to adjust and pay immediately 50*l.* on account, but no abandonment was made by the assured; and in the mean time the foreign consignees of the goods, in consequence of remonstrances to the enemy's government, obtained a restoration of half the proceeds of the goods, which had been so seized and sold, which half amounted to more than the whole sum at which they were valued in the policy. The Court held that the underwriters were not entitled to recover back the 50*l.* per cent. they had paid on account, the assured having in fact sustained a loss of half his goods, for which he was no more than indemnified by the 50*l.* per cent. he had received, and there having been no abandonment to the underwriters, and the superior value of the other half of the proceeds arising from the benefit of the market, in which the underwriters had no concern.

17. *BARCLAY V. STIRLING*. E. T. 1816. K. B. 5 M. & S. 6.

A policy on freight, at and from the ship's port of loading at Y. to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading, as aforesaid, with leave to discharge, exchange, and take on board goods at any port she may call at, without being deemed a deviation, the Court held that it covered the freight of goods loaded at an intermediate port; and therefore where the ship, having sailed with cargo loaded at Y. was during the voyage cast on shore at an intermediate port, and lost a part of her cargo, and took on board other goods at the port to complete her cargo, and arrived at her port of discharge and earned freight; the Court were of opinion that the assured, who had abandoned to the underwriter upon intelligence of the loss, and had adjusted with him as for a total loss, was liable to the underwriter for the freight of that part of the cargo loaded at the intermediate port, after deducting the expences attendant upon procuring the said freight.

(P) RELATIVE TO ABANDONMENT.*

(a) *When necessary, and when permitted.*

1. *MITCHELL V. EDIE*. H. T. 1787. K. B. 1 T. R. 615. S. P. *DA COSTA V.*

NEWHAM. E. T. 1788. K. B. 2 T. R. 407. S. P. *ANDERSON V. ROYAL EXCHANGE ASSURANCE*. 7 East, 38. *TANNO V. EDWARDS*. H. T. 1810.

K. B. 12 East, 491. S. P. *MARTIN V. CROKATT*. M. T. 1811. K. B. 14 East, 466. *DAVY V. MILFORD*. E. T. 1812. K. B. 15 East, 565.

It has been held by the Court of King's Bench, that as soon as the insured receive accounts of such a loss as entitles them to abandon, they must, in the first instance, make their election whether they will abandon or not; and if they abandon, they must give the underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can never afterwards recover for a total loss.

* An abandonment signifies a giving up to the underwriters of the thing insured, or such part of it as may remain on a loss taking place; when the property or a part of it is still in existence, and the insured yet claim for a partial loss (as in certain cases they may), they must abandon what is saved to the underwriters; for if they would retain what is saved, and yet recover for a total loss, they would receive more than one indemnity.

2. MELLISH V. ANDREWS. H. T. 1812. K. B. 15 East, 13.

It is always necessary to notice a constructive total loss.

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Policy of assurance on goods at and from London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders, or any other purpose, and to touch and stay at any ports or places whatsoever and wheresoever. The Court held, that the ship having touched at C. for orders, and gone on to S., a more distant port, for further orders, and having received orders at S. because it was unsafe to land there, to return to C. and wait for orders, might so return to C. without being guilty of a deviation, it being found that she went to S. for orders, in the prosecution of her voyage, and returned to C. to obtain orders as to the farther progress of the voyage, and no fraud being found.

3. MARTIN V. CROKATT. M. T. 1811. K. B. 14 East, 465.

Upon the happening of such a peril suspending the voyage, and inducing the necessity of repair to such an extent as entitles the assured to consider the loss total, abandonment is necessary.

The ship in the course of her voyage was run foul of by another vessel in a gale of wind, and from that and other sea perils received so much damage as to be obliged to put into Warberg Roads, a small fishing place on the coast of Sweden, where she was surveyed and reported to be incapable of proceeding on her voyage, without a thorough and very expensive repair. The assured, without giving notice of abandonment, on receiving the intelligence, laid it before the underwriters, and required their directions how to proceed; but they refused to interfere, and denied the right of the assured to abandon, though without assigning any reason for it; upon which the assured directed a sale of the ship and cargo (which was undamaged), for the benefit of all concerned; but the proceeds of the sale, after deducting the expences of it, and of the salvage, left a balance against the assured of above 20*l*. Whereupon it was contended, on behalf of the assured, that inasmuch as the original damage, which in the event had turned out to be total loss in the value of the ship and cargo, was occasioned by a peril insured against, and that the voyage was thereby lost, they had a right to treat it as a total loss, with benefit of salvage to the underwriters. But Lord Ellenborough, C. J. being of opinion that for want of an abandonment the assured were not entitled to treat this as a total loss, where the ship continued to subsist in specie, in the place whither she was carried, directed a nonsuit.

4. DAVY V. MILFORD. E. T. 1812. K. B. 15 East, 559.

The wreck and deterioration of the goods cannot be considered a total loss, without a abandonment.

Policy of insurance on flax at so much, and warranted free of particular average. The vessel was wrecked, and the assured does not abandon, but labours to save the cargo, and in fact saves a part (one-tenth), though much damaged. Lord Ellenborough, C. J. It was decided in the case of *Anderson v. The Royal Exchange Company*, 7 East, 38; that in order to constitute a total loss, where the thing insured subsists in specie, there must be an abandonment in time to the underwriters. In that case the assured might have abandoned while the corn remained under water, but they laboured to get it up and preserve it, and when they afterwards did abandon, upon finding that it did not answer to them, it was too late. It had been before held in *Mitchell v. Edie*, 1 T. R. 608, that an abandonment must be made promptly, if at all; otherwise, if part of the goods be saved to the assured, it is only an average loss. Here there was no abandonment; and therefore under the terms of this policy, which warrants the underwriter free from particular average, the plaintiffs cannot recover, unless there was an actual total loss.

5. CAZALET V. ST. BARBE. E. T. 1786. K. B. 1 T. R. 187.

[446] An assured can only abandon wheretere has been a total loss of the property insured.

The evidence proved, that the defendant underwrote the policy, that the damages sustained by the ship in the voyage insured, do not exceed 43*l*. per cent., which the defendant hath paid into court. Upon pleading in this action, that when the ship arrived at the port of Lynn she was not worth repairing, the question for the opinion of the Court is, whether the plaintiffs have a right to abandon? If the Court shall be of opinion that the plaintiffs have right to abandon, then a verdict to be entered for the plaintiffs—damages 52*l*. and costs 40*s*.; but if the Court shall be of opinion that they have not a right to abandon, then a verdict to be entered for the defendant. The counsel for the plaintiff made two points; 1st. Though a ship has gained

her destined port, yet if, upon her arrival, she is so much damaged as to be unfit for future service, and not worth repairing, the insured may abandon, as in case of total loss. 2nd. Under the circumstances of this case, the plaintiff had a right to abandon as for a total loss. *Per Cur.* Nothing can be better established than that the owner of a ship can only abandon in case of total loss. In the case of *Jenkins v. Mackenzie*, 5 Brown's Ass. 131. though the ship was brought into port, yet the capture, as between the assuer and assured was a total loss. But there is no instance where the owner can abandon, unless at some period or other of the voyage there has been a total loss. No such event has happened here; for the jury here expressly found that the loss amounted only to 48l. per cent. Even allowing total loss to be a technical expression, yet the manner in which the plaintiff's counsel have stated it is rather too broad. It has been said that the insurance must be taken to be on the ship as well as on the voyage; but the true way of considering it is this,—it is an insurance on the ship for the voyage; if either the ship or the voyage be lost, that it is a total loss; but here neither is lost.

6. *DA COSTA v. NEWMHAM*. E. T. 1788. K. B. 2 T. R. 412.

Per Cur. But when the vessel is not worth repairing, the assured is clearly entitled to abandon.

7. *ROTCH v. EDIE*. M. T. 1795. K. B. 6 T. R. 413. S. P. *HAMILTON v. MENDEZ*. H. T. 1761. K. B. 1 Blac. Rep. 276.

The question came before the Court upon a special case reserved for its opinion, upon the trial of an action on a policy of insurance on three ships, the *Adelaide*, *Adele*, and *Victor*, their stores, boats, fishing materials, &c., upon two of them at and from L'Orient, and upon the third at and from and after her arrival at L'Orient, and on all of them to all ports, seas, and risk has at places whatsoever, beyond and on this side the Capes of Good Hope and Horn, on the southern whale and seal fishery and trade, and until the ship's arrival back at L'Orient. The loss is stated by the declaration to have happened by the ships and their stores and provisions being, by the authority of certain persons exercising the powers of government in France, at Port Louis with respect to one, and at L'Orient with respect to the two others, arrested and restrained from further prosecuting their voyages, and that they had thence hitherto been prevented and restrained therefrom under and by virtue of such restraint. The case stated that the ship *Adelaide* sailed from the port of L'Orient on the voyage insured, but was obliged to put back by stress of weather into Port Louis, and whilst she lay there, and the ships *Adele* and *Victor* were preparing for the voyages in the policies mentioned, and before the necessary passports and clearances could be obtained, on the 5th of February, 1793, an embargo was laid on all vessels in those ports; that the *Adelaide* was brought back to L'Orient, and the perishable stores of all the three ships sold; and the said three vessels, with the rest of the stores, now remain at L'Orient under the embargo, which has continued ever since on all ships destined on long voyages, and none have since been permitted to sail, except those in government service or upon short coasting voyages. The *Adele* and *Victor* had entered outwards upon the voyages insured when the embargo came, and that alone prevented the ships from sailing. Notice of abandonment was given to the underwriters on the 27th of February, 1793, and a total loss claimed, and the like notice and claim were repeated in August, 1793.

Per Cur. We have looked into all the cases which have been cited, and we have also considered the passages collected from foreign writers, and the most respectable of them seem to us to coincide with the construction which an English court of justice would put upon such an instrument as the present. The plaintiff is under no disability to sue, and the defendant has entered into an engagement to indemnify him against arrests, restraints, and detentions, of all kings, princes, and people, of what nation, condition, or quality soever. By this peril the ship has been detained near three years and the voyage is defeated; but the plaintiff is to be told this is not a loss within the policy. No common man, reading the words of the policy, could doubt the ques-

And when the vessel is not worth repairing the assured may abandon;

Or where the voyage is lost, or an embargo after the vessel is lost;

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tion; and it is by artificial reasoning only, collected by great reading upon foreign authors, that his claim can be repelled, but, in truth, when examined, the research turns out to be all one way, and that is in favour of the plaintiff. *Roccus, Le Guidon, and Green v. Young*, from Lord Raymond, are all one way; and although Lord Holt is said not to have given an absolute opinion, every thing that fell in judgment from that great man is deserving of the highest attention. Lord Mansfield too has given an opinion upon the very point (2 Barr. 696); and when, to this current of authorities, we add the words of the policy itself, it is perfectly clear. Suppose war had been declared, and the ship had been detained in port as a prize; could there have been a doubt? and we can see no difference between the cases.

8. *COLOYON v. LONDON ASSURANCE COMPANY. M. T. 1816. K. B. 5 M. & S. 447.*

So where there can be no affectual restitution, the insured may abandon.

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Action on a policy of insurance at and from Quebec to Teneriffe, on a cargo of wheat, fish, and staves, with the usual memorandum as to corn and fish, free from average unless general; the ship was captured and afterwards recaptured, and sent by the recaptors to Bermuda, where a scarcity prevailing an embargo was laid on the exports of provisions, and the cargo being landed, it was found that 585 bushels of wheat were damaged by sea-water; that they were, by order of the magistrates, for sake of the public health, thrown overboard; and other part of the wheat being damaged, the captain sold that part and the fish, which sold at a profit, and put up the ship to sale, which he purchased at not more than one-fourth of its value, for the benefit of the owners, and having repaired her, and being refused permission to ship the remaining wheat to Teneriffe, he directed it to be sold, and purchased it for the benefit of those concerned; and by the leave of the governor, the embargo being then raised as to the West India islands, shipped the same for Madeira, where he arrived and delivered it, and took in a cargo of wine for London, with which he arrived.

Per Cur. It appears to us that, according to the facts stated in this case, the plaintiffs were warranted in making abandonment; and that nothing which afterwards happened has deprived them of the right to insist on this abandonment. At one period, doubtless, there was a total loss, by the capture of the ship; circumstances might have intervened which would have changed this loss from a total to a partial loss. The object of this policy is to insure the risk against failure by reason of any of the perils mentioned in the policy; that is, in the present instance, that the cargo should reach the port of destination.

Or when a considerable part of the cargo is lost or damaged by the perils of the sea, and it becomes necessary to sell or dispose of the residue, so that the further prosecution of the voyage is impracticable, the insured may recover for a total loss;

The destination is to Teneriffe; the ship, with the cargo, in her course thither is captured; recapture follows, but not so as to enable the ship to proceed to Teneriffe, for she is sent to Bermuda, where she is placed under an embargo, from which she is never released, except upon condition of altering her destination, to Madeira. Therefore, there has been no restitution of any part of the cargo, as it regards the risk insured to Teneriffe. If it be so, it follows that the ship and cargo were never effectually redeemed from capture; and the plaintiffs are entitled to recover as for a total loss.

9. *HUDSON v. HARRISON. M. T. 1821. C. P. 3 B. & B. 97.*

Insurance on a cargo of wine, to be discharged partly at B., partly at D., and partly at L. The vessel which conveyed the cargo being wrecked near B., and three-fourths of the cargo being either lost, or so impregnated with salt water as to render it imprudent to delay the sale till the ports of D. or L. could be reached, the assured, on the 23rd of December, the day they heard of the loss, gave notice of abandonment, and on the 27th of December called a meeting of underwriters, at which three underwriters attended, and ordered the assured to do the best for all parties. On the 28th of the ensuing February, and not before, some of the underwriters interfered, forbidding a sale of the damaged wine about to take place at B., and rejecting the abandonment. The Court held the insured was entitled to recover for a total loss.

10. *M'IVER v. HENDERSON. H. T. 1816. K. B. 4 M. & S. 576.*

Or where a capture takes place,

A ship insured from Liverpool to Sierra Leone was captured, plundered, her guns, stores, papers, and instruments taken away, and the voyage lost, and

was carried to Fayal, where proceedings were instituted in the Admiralty Court, [449] and sentence was pronounced in favour of the assured; but appeal was made and the circumstances against such sentence, and the assured abandoned, which abandonment the underwriter refused to accept; and afterwards the remainder of her cargo was sold at Fayal, and the law expenses were paid thereout, and the rest left as a deposit to answer the event of the appeal, in order to obtain the release of the ship; and afterwards the ship returned to Liverpool. and the circumstances which follow it are such that the ship is not set free upon the deposit of a large sum, which renders it probable that the whole or greater part of the value may be absorbed in the expenses.

Per Cur. It has not been disputed, nor can it with any other colour of argument be contended, that on the 4th of April, 1814, there was not a sufficient ground for the abandonment of the ship, which was on that day made to the underwriters. The ship had been captured, and plundered of thirteen out of sixteen of her guns, and of her stores; and possession of her was not restored till the 11th of May, 1814. But it has been argued that, as a contract of assurance is a contract of indemnity, therefore, the nature of damnification at the time when the action is brought is to be regarded as the criterion of the right to recover as for a total loss; and at that time, what had antecedently been a total loss had by subsequent events ceased to be so, and had become an average loss merely; that a compensation as for an average loss could alone be recovered; and the case of *Godsall v. Boldero*, 9 East, 72, principally decided upon the authority of Lord Mansfield in *Hamilton v. Mendes*, as to this point, and the case of *Bainbridge v. Neilson*, 10 East, 329, were cited for this purpose. But in the former of those cases all cause of damnification had ceased before the action brought; and in the latter (which was an action as for total loss upon a capture and abandonment as here) there was an entire restitution of the ship insured in an undamaged state, and she afterwards earned her freight, so that all pretence of total loss with reference to the time of bringing the action had in that case ceased; her guns and stores taken out of the ship were never restored; her voyage was completely lost; and the ship itself was never fully liberated and restored, but upon an actual deposit of a large sum, viz. 427*l.* 18*s.* 9*d.* to abide the event of the appeal, as to the entire right of the property in the ship itself, and subject to the risk, not only of the plaintiff's losing that deposit, but of being condemned in damages to a much larger and indefinite amount. Under these circumstances, what can be said to be the limit of the plaintiff's loss? If it is an average loss, who can state the amount of such average? and if not a total loss, by what circumstances, and to what amount, it is placed below that standard. The mere restitution of the hull, the plaintiff may eventually pay more for it than it is worth, is not a circumstance by which the totality of a loss is reducible to an average one, if no abandonment had been already made. Do not sufficient circumstances exist in this case to warrant an original abandonment at the present moment? The voyage is lost; the cargo which was to be conveyed in the ship is wholly gone; she is stripped of a great part of her equipment, stores, and furniture, and the ultimate recovery of any thing is uncertain, and attended with the trouble, expense, and hazard of litigation. And can it be said that an abandonment, unquestionably competent to have rendered the loss a total loss, recoverable as such at the certain time it was made, can be frustrated and disappointed by the continuance in part of the same, and the occurrence in part of other accessory causes of loss of a similar kind? [450]

11. *CONWAY v. DAVIDSON. SAME v. GRAY. H. T. 1809. K. B. 10 East, 536.*

These were cases in each of which the plaintiffs claimed a right to abandon in consequence of the American embargo in December, 1807; and the main question in each was the same. The first was upon a policy on goods on board the *Swift*, at and from New York to Liverpool, and the interest was averred, in count, to be in the plaintiffs jointly; in another, in one of them only, i. e. Thomas Davidson; and in a third, in one John Townsend. Townsend was a resident citizen in America, and had consigned the goods to the plaintiffs for sale on his, Townsend's, account and risk. The plaintiffs Conway and Davidson, are British subjects, carrying on business as merchants in partnership in Liverpool, Conway residing at Liverpool, and Davidson for

But an embargo by an alien's own government does not entitle him to abandon;

some time past resided in America. The invoice and bill of lading are dated 29th December, 1807. Before the shipment Davidson had agreed to grant Townsend an anticipation of 6,000*l.* on account of these and certain other goods by bills of the plaintiff, and accordingly, on the 7th of November, 1807, bills to that amount were drawn by Townsend on the plaintiffs, and these bills were accepted by Davidson, the partner of Conway, in America, within a day or two within their date, and were paid when due by the plaintiffs. The plaintiffs have been reimbursed part of the amount of those bills, but 2,122*l.* 18*s.* 3*d.* is still due to them upon that transaction. This policy was subscribed on the 25th of January, 1808, and the plaintiffs charged the premiums to Townsend's account. On the 22nd of December, 1807, an act was passed by the American government for laying an embargo on all ships and vessels in their ports. By this embargo this vessel was detained, and as soon as they heard of the detention, the plaintiffs abandoned. It is stated, indeed, in the case of Conway v. Gray, that the plaintiffs abandoned the vessel, and nothing is said as to the goods; and as the insurance was on the goods, an abandonment of the vessel could give no claim; but we presume that this is a mistake, and the goods were abandoned. In the second and third cause the facts are nearly similar.

[451] *Per Cur.* Upon each of these cases this question arises; first, whether the American embargo will warrant an abandonment by or on behalf of an American subject; and if not, then a second question arises in the first and second causes, whether Conway and Davidson, as consignees of the goods, being in advance to the consignors, and under acceptances for them (in one case the plaintiffs being in advance, and also under acceptances; in the other case, against Forbes, the plaintiffs were only under acceptances,) have a right to apply the policies to their own interests as such, and to abandon on that account? As to the first, in all questions arising between the subjects of different states, each is a party to the public authoritative acts of his own government; on that account a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a British subject, in a British court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself. This seems to be established by *Touteng v. Hubbard*, 3 B. & P. 291. That was an action by the owners of a Swedish vessel against a British subject for not supplying the vessel with a cargo at St. Michael's. The sailing of this ship from this kingdom had been prevented a considerable time, and until it was too late for the fruit season at St. Michael's, by an embargo here upon Swedish vessels. That embargo was in the nature of reprisal for considered acts of aggression by the Swedish government. The Court was of opinion, that if that had not been the case of a Swede against a British subject, the plaintiff would have been entitled to recover; but as the embargo was produced by acts of the Swedish government, and every Swede was to be considered party to those acts, it was in effect the plaintiff's own fault that this vessel was detained, and the loss which resulted from it was one he ought himself to bear. He was bound to proceed with all convenient speed; the acts of his government led to his being prevented; he was considered as a party to those acts, and was therefore looked upon as having failed in his part of the contract, viz. "proceeding with all convenient speed." In the cases now before the Court, the foundation of the abandonment is an act of the American Government. Every American subject is to be considered as a party to that act, and it has virtually the concurrence and consent of all, and, amongst the rest, the concurrence and consent of the assured in these cases. The assured therefore have joined in a resolution that the ships in question shall not be allowed to sail, but shall remain in their ports; and is it possible for them afterwards to make their not sailing the foundation of an action? The party who himself prevents the act from being done has no right to call upon the underwriters to indemnify him against the loss he may sustain from such act not being done. Where the insured and the insurer are both subjects of the same

state, the question will stand upon very different grounds of consideration. As to the second question, whether the consignees have not a right to apply the policies to their own interests, and to abandon that account? we are of opinion that they have not. It might, perhaps, be difficult to make out that they had such an interest as was capable of abandonment, because they were to have no control over the goods but upon their arrival in England; and it may also be very questionable whether any policy which is effected clearly to cover the interest of the consignor, can be applied to protect the interest of the consignee; but the particular ground of our decision is this, that, where a policy is effected on behalf of the consignor, and the conduct of the consignor, or of the state to which he belongs, has taken away from him the right of enforcing it directly and effectually for his own benefit, the consignee is not at liberty to apply to his interest, and enforce payment as though it had been made on his account. We do not say a consignee may not insure; we only say he is not so far identified in interest and right with his consignor, as not to be able to apply with effect to his own interest, which is derived out of that of the consignor, an insurance which was effected in order to cover the interest of the consignors, but which, upon the principle already stated, cannot be available for that purpose. The underwriter has an implied pledge from the assured, that he will do no act to obstruct the voyage; and when that pledge is broken by the person on whose account it was made, can another person, who has paid no premium out of his own pocket, step in to take the benefit of that insurance, merely because his dealings with the assured would have enabled him to have insured in his own name? There is no case which decides that he can, and it would be gross injustice that he should. *Wolffe v. Horncastle*, 1 B. & P. 316. which was cited in the argument, goes no such length. In that case the plaintiffs had effected a policy to cover the interest of one Lund in a cargo, and had advanced 300*l.* on the credit of that cargo. The main question was, whether the policy were so effected as to cover Lund's interest? and if it were not, then it was contended that it might be applied to cover that interest which the plaintiffs had acquired by their advance of the 300*l.* The Court was unanimous that the policy was so effected as to cover Lund's interest, so that a decision upon the other point was unnecessary; but they intimated a clear opinion upon that point, that the plaintiffs had an insurable interest; and they seem to have thought the policy might have been applied to it, if it could not have been applied to Lund's. How does that case, however, bear upon this? Lund had done no act to forfeit his right upon the policy, and if he could not have recovered, it would have been merely because the policy was not effected so as to be capable of covering his interest, the only objection made to Lund's interest being that *Wolffe* had made the insurance without orders or authority from Lund; and then if it could not apply to the 300*l.* the plaintiffs had advanced, it would have been applicable to nothing.—Here the policies were effected so as to be capable of covering the consignor's interest, and for the express purpose of doing so; they are applicable to that, and the consignors have forfeited their rights by the act of their government. The case of *Wolffe v. Horncastle*, therefore, concludes nothing in favour of these plaintiffs. In truth, in case the plaintiffs had been allowed to recover upon their own interest on account of the advance they had made, it would in substance have been suffering Lund to recover *pro tanto*, because then they could not have resorted to him for reimbursement; and in these cases, if Conway and Davidson were allowed to recover in respect to their advantages, it would in substance be suffering the American consignors to recover *pro tanto* because it would wipe off the claim which Conway and Davidson have upon them. In *Wolffe v. Horncastle* it would have been in furtherance of justice, because Lund had done nothing to forfeit his claim on the policy; in this case it would be against justice, because these American consignors have done that by which their claim is precluded. For these reasons we are of opinion that in each of these cases the *postea* must be delivered to the defendant.

12. *HUNT v. ROYAL EXCHANGE ASSURANCE*. E. T. 1816. K. B. 5 M. & S.
 47. *S. P. ANDERSON v. WALLIS*. M. T. 1813. K. B. 2 M. & S. 240;
 S. C. 3 Campb. 440.

So a loss of the voyage [453] or the sea son is not a ground of abandon ment upon a policy on goods warranted free from average, unless general, when the cargo is in safety and not of a perishable nature.

Two of the plaintiffs resided at Waterford, in Ireland, a third at Sudbury, and the remaining two at Dartmouth, in Devonshire. The plaintiffs who resided at Waterford caused the said insurance to be effected in London, and were interested in one-third of the pork, and half of the flour, the other plaintiffs being interested in the residue. The goods were loaded at Waterford, and the ship sailed as stated in the declaration, and joined convoy in Cork on the 3rd of October, 1813; and, in the course of her voyage between the 8th of that month, and the 13th of November, continued to meet with such tempestuous weather, and thereby suffered such heavy damage, that it became necessary, in order to lighten her, to throw overboard at different times various parts of her cargo and provisions, and also five of her guns; and finally, it became necessary for the preservation of the ship and cargo to put back to Cork, which place she reached on the 16th of November. On the next day, a protest was made, by the captain and two of his crew, stating the damage which the ship had sustained, and on the succeeding day a survey was held on the ship, and a farther survey on the 8th of December. By the report of the surveyors on the latter survey, which was drawn up by the notary on the 11th, the ship was pronounced to be not worth repairing, and her hull and materials were directed to be, and were, sold by public auction. Soon after the ship's return to Cork, the whole of the goods insured, except 24 barrels of flour thrown overboard, were landed and warehoused. On the 15th of December, the plaintiffs who resided at Waterford apprised the plaintiffs who resided at Dartmouth, by letter, of the ship's being condemned; but before their letter reached Dartmouth, viz. on the 18th, received a letter from the plaintiffs resident there, written on the 12th of December, desiring them, in the event of the ship's condemnation, to cause notice of abandonment to be given them; in consequence of which letter they wrote on the said 18th to the brokers in London to give such notice. This letter was received by the broker's on the 21st, who accordingly on the next day gave notice of abandonment to the defendants, which was the first communication made to them by the plaintiffs or their agents of the accident that had befallen the ship and cargo; and no document or statement was then furnished to them of the state or condition of the cargo. The defendants on receiving the notice, answered that they had no orders to give, but that the assured must act as if they were not assured, and make their claim on them for any loss they were liable to pay. So soon as it was determined by the owners of the ship that they could not repair her, the pork and flour were sold by public auction, which was on the 8th of March, 1814. Owing to the damage sustained by the ship, the goods could not be forwarded by her, and no opportunity afterwards offered of forwarding them by any other ship to St. John's, Newfoundland, until the spring of 1814. The sum of 835*l.* 3*s.* 6*d.* paid into Court is the amount of the general average and the partial loss of the pork, and for such part of the flour as was thrown overboard in the course of the voyage. The question for the opinion of the Court is, whether, under the circumstances above stated, the plaintiffs have a right to abandon? and if so, whether the abandonment was made in time? If the Court shall be of opinion with the plaintiffs on both points, the verdict to stand; if not, a nonsuit to be entered.

[454] *Per Cur.* The questions which arise for our consideration are, first, whether the circumstances warranted an abandonment? and, secondly, whether the abandonment was made in due time? The ground on which the plaintiffs insist that they were warranted in abandoning, is that the voyage was lost, and that the loss of voyage in a case like the present is a good cause of abandonment; and the case of *Manning v. Newnham* has been relied on as an authority, importing that an assured is entitled to abandon ship, freight, and goods, in the event of the voyage being lost. But on reference to the language of this policy, it is difficult to infer from any part of it that assured were

to be entitled to abandon on the ground of a mere loss of voyage; for, suppose in this case the ship, before she set sail, had been run foul of by another vessel, but not so as immediately to sink, and the flour had been reloaded, and afterwards the ship had gone to the bottom, the flour being in an undamaged state, but there being no other ship at the port capable of immediately forwarding the cargo to the place of its destination; if the argument for the plaintiffs be good, it follows that the assured, under such a state of circumstances, would be entitled to abandon. But we know of no authority that can fairly be said to go that length. There are cases, certainly, which speak of a loss of voyage as a ground of abandonment, and such cases may be conceived; for instance, if a ship were so damaged as to be obliged to land her cargo at an unfrequented place, where there was no opportunity of disposing of the cargo, and the shipowner could not procure another vessel to forward the cargo, except at an expense exceeding the value of the goods; such a case, we think, might warrant an abandonment, and throw the loss on the underwriter. But there is a great difference between the case just put and this case, where goods are safely warehoused in an undamaged state, and where there is nothing but a disappointment of voyage to constitute a ground of abandonment; for we are not warranted in supposing that the goods were in a worse condition than when they were put on board. On these grounds it seems to us that the assured have no right to abandon. On the second point, it seems to us that the plaintiffs who caused the policy to be effected must be considered as agents for the rest: this was a joint insurance, and in the nature of a partnership as it regards this transaction; and like the case of several persons who join in making promissory notes, although they are not otherwise partners, the act of one, as it relates to the particular transaction shall be sufficient to bind the rest—It seems to us, therefore, that the abandonment was not in due time, but ought to have been made at an earlier period.

13. *THELLUSON v. FLETCHER*. M. T. 1793. N. P. 1 Esp. 73.

An insurance was effected on some hogsheads of sugar on a voyage from Ostend to Havre. The vessel sailed from Ostend, but was forced on shore, and the cargo damaged. The assured wrote to the underwriters to inform them of the circumstances, and of the injury which the sugar had sustained. The underwriters, in answer, desired, "that the assured would do the best with the damaged property." It was holden, that the letter, coupled with the answer, did not amount to abandonment. Where there is a partial loss, the assured cannot abandon.

14. *GREEN v. ROYAL EXCHANGE ASSURANCE COMPANY*. H. T. 1815. C. P. [455]

6 Taunt. 68; S. C. 2 Marsh. 447. *S. P. PARMETER v. TODHUNTER*. M. T. 1808. N. P. 1 Campb. 541; S. C. 1 Park, Ins. 286. *S. P. MORDY v. JONES*. T. T. 1825. K. B. 4 B. & C. 394.

Freight is insured from A. to B. The ship sails, but is obliged to put back from stress of weather, when she is found capable of complete repair, and the cargo is accordingly unloaded, and the ship sold. In an action on the policy for a total loss, In the case of freight,

Per Cur. We are of opinion that there is no ground for saying there should have been an abandonment; the case should be reconsidered on the second ground. If the ship had brought home another cargo, that would have been a salvage on the original freight; for though, when the cargo was taken aboard, the insurance was on that specific cargo, yet, if the ship, having been driven back to her original port of lading, had taken another full cargo on board at a lower freight, the plaintiff would only have been entitled to have recovered the difference. So, if the ship had been repaired sufficiently to bring home a smaller cargo, that would have been a salvage out of what she would have earned had the voyage been prosperous. We think the insured ought to have acted as if the adventure had not been insured; and if a man of common prudence would have repaired her for his own advantage, not being insured, he should have done so on account of the underwriters, otherwise he would have been selling the ship for the purpose of throwing the loss on the underwriters. The case, therefore, should go to another jury to consider

whether, in point of fact, the ship was sold for that purpose, or whether the owner or his agent pursued the same course as if he had not been insured, in which case he would be entitled to recover as for total loss.—Rule absolute for a new trial.

15. *McCarthy v. Abel*. T. T. 1804. K. B. 1 Smith, 534; S. C. 5 East, 388. *S. P. Everth v. Smith*. H. T. 1814. K. B. 2 M. & S. 278. *Brotherston v. Barber*. M. T. 1816. K. B. 5 Id. 418.

The insurer cannot recover for a total loss under a notice of abandonment, if freight be subsequently earned.*

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Where a captain hearing that if he enter the port of his destination the vessel will be lost by confiscation, avoids the port, whereby the object of the voyage is defeated, the assured on goods can not abandon as a total loss.

Upon a hostile embargo in a foreign port, the shipowner, who had separately insured ship and freight, abandoned them to the respective underwriters at the same time; the abandonment was accepted by the underwriters; afterwards the embargo was taken off, and the ship completed her voyage, and earned freight. The freight having been paid by the freighters to the underwriters on the ship, the shipowner, the assured, brought an action against one of the underwriters on freight, claiming as for a total loss. It was holden, that the assured could not recover, the freight having been in fact earned; or, supposing it to have been in any other sense lost to the assured, by the abandonment of the ship to the underwriters thereof, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment, with which, and the consequences thereof, the underwriters on freight had not any concern.

16. *Hadrinson v. Robinson*. E. T. 1803. C. P. 3 B. & P. 388.

Action on a policy of insurance for pilchards on board the *Paxaro*, at and from Mount Bay in Cornwall to Naples, with leave to join the convoy at Naples or elsewhere. The policy contained the usual memorandum, exempting the underwriter from voyage losses on fish, &c., unless general, or the ship be stranded. The declaration stated the loss to be, that after the loading of the said pilchards on board, &c., the said ship or vessel with the pilchards, &c. departed and set sail from the said port of Penzance aforesaid, on her said intended voyage, in the said writing and policy of insurance mentioned; and afterwards, and whilst the said ship was so sailing and proceeding on her said voyage, and before her said voyage, and before her arrival at Naples, to wit, on, &c. the port of Naples aforesaid, was, by the persons exercising the powers of government in the Kingdom of Naples, shut against all ships, the property of any of the subjects of our said Lord the King, or sailing under the colours of our said Lord the King, and against all merchandizes, the property of any such subjects, carried in such ships, under the pain of such ships and merchandizes being confiscated by the persons exercising the powers of government in the kingdom of Naples, whereby the said ship, with the said pilchards on board (the said ship being then and there the property of the subjects of our Lord the now King, and sailing under the colours of our Lord the now King, and the pilchards being then and there the property of the plaintiff, who was then and there a subject of our Lord the now King), was then and there prevented from pursuing her voyage to Naples aforesaid; and the voyage was thereby then and there wholly defeated and lost, and the pilchards then and there became of no value to the plaintiff. At the trial before Lord Alvanley, it appeared amongst the other facts, that after this vessel sailed from Lisbon in the prosecution of her voyage, she received intelligence that English vessels were excluded from all the ports of Naples, and that afterwards the commander of the convoy ordered that all vessels destined for Naples or Sicily were to proceed to Port Mahon, where the report respecting the state of the ports of Naples was confirmed. That in consequence of this, a survey of the cargo was taken under the direction of the Vice-Admiralty Court of Minorca, and sold there for a small sum of money. The assured abandoned to the underwriters, who refused to accept it. The jury found a verdict for the underwriters, to set aside which a motion was made in the following terms. After argument at the bar, and time taken to deliberate, Lord Alvanley delivered the judgment of the Court, confirming the verdict of the jury.

* On wagering policy there can be no abandonment; *Kemp v. Vayne*, 1 T. R. 804.

17. LUBBOCK v. ROWCROFT. T. T. 1803. N. P. 5 East, 50.

This was an action on a policy of insurance on twenty bags of pepper on board the ship *Nelly*, at and from London to Naples, Leghorn, or Messina, with liberty to touch at Gibraltar, or any other port in the Mediterranean. The goods were on the account of Antonio Rezzati, of Messina. The plaintiff went for a total loss under these circumstances: that the ship having arrived at Minorca in the Mediterranean, it was found that Messina was in the hands of, or blockaded by the French; in consequence of which he abandoned to the underwriters, and went for a total loss.

So, when goods are [457] consigned to a particular port, which is found to be in the hands of an enemy, that circumstance does not warrant the assured to abandon.

Lord Ellenborough said, the abandonment was from an apprehension of an enemy's capture, and not from any loss within the terms of the policy; that if such was allowed, every ship about to sail from the port of London for a port which had fallen into the hands of the French might be abandoned; but he would suffer the cause to proceed.

18. HUDSON v. HARRISON. M. T. 1818. C. P. 6 Moore 288; S. C. 3 B. & B. 97.

Insurance on a cargo of wine, to be discharged partly at B., partly at D., and partly at L. The vessel which conveyed the cargo being wrecked near B., and three-fourths of the cargo being either lost, or so impregnated with salt water as to render it imprudent to delay the sale till the ports of D. or L. could be reached, the assured, on the 23rd of December, the day they heard of the loss, gave notice of abandonment, and on the 27th of December called a meeting of underwriters, at which three underwriters attended, and ordered the assured to do the best for all parties. On the 28th of the ensuing February, and not before, some of the underwriters interfered, forbidding a sale of the damaged wines about to take place at B., and rejecting the abandonment.

When a considerable part of the cargo is lost or damaged by perils of the sea, and it becomes necessary to sell or dispose of the residue, so that the further prosecution of the voyage is impracticable, the insured may recover for a total loss.*

Per Cur. Most of the cases connected with the subject of insurance depend upon their own particular facts. It is admitted that if the loss here was in its nature total, the assured have a right to recover. We think the loss was in its nature total. The ship was wrecked, and the greater part of the cargo damaged and under water for nine hours at a time. Did the loss continue total? The plaintiffs abandoned on the 23rd of December, and gave the underwriters notice, that is, they insisted on a total loss, and followed it up in the best way they could. The defendant having never interposed during all this time, must be taken to have accredited what the plaintiffs did. A meeting of the underwriters was called; and if this was not the usual way of proceeding, it should have been so stated in the case. A certain number of them attended; and our opinion is, that the defendant was bound by what was done upon that occasion. The underwriters who attended authorised the plaintiff to send a person to Bristol, at the expence of the underwriters, to superintend the preservation of the cargo, and to act in every respect as if there had been no insurance. As this part of the case stands, it is as much as to say that the policy was at an end. The case then goes on: "and the plaintiffs accordingly sent a person to Bristol for that purpose." Under these circumstances matters went on a considerable time, and till the 28th of February there was not a word of objection on the part of the defendant. A notice to countermand the sale of the damaged wines was sent after the sale had been advertised, and when all opportunity of forwarding the wines with advantage by another vessel was lost to the plaintiffs. This case does not touch on any former decision, but depends on its own circumstances, and clearly entitles the plaintiffs to recover for a total loss. If the underwriters meant otherwise they should have acted otherwise; as they have acted they must be taken to have acquiesced in abandonment.

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19. CAMBRIDGE v. ANDERTON. E. T. 1824. K. B. 4 D. & R. 203. S. C. 2 B. & C. 691; S. C. 1 R. & M. 60.

Action on a policy of insurance. It appeared in evidence that the *Com-ship was so much damaged by*
 * When a ship being driven by stress of weather, entered a port where there was no dock to receive her, and was found, on a survey, to be considerably damaged and incapable of being removed to any port for the purpose of repair, so that it was deemed expedient to break her up for old timber, an abandonment was holden to be necessary; see *Bell v. Nixon*, Holt N. P. 423; id. 425, in banco.

perils of the sea that in order to render her seaworthy it would cost more to repair her than she would be after wards worth, and the captain sold her to a purchaser; who partially repaired her and sent her upon a voyage she never completed in consequence of her infirmity, held that the insured were entitled to recover as for a total loss, with notice of abandonment.

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merce, of the burthen of 372 tons, having taken in a full cargo of timber, sailed from Quebec on the 8th of July, 1823, in good order, and with a sufficient crew, and proceeded down the river St. Lawrence, destined for the port of Bristol. On the 10th of July, the pilot quitted the ship off the Isle of Bie, about 100 miles below Quebec, where pilots are usually discharged. On the 12th she was off a place called the Pups of Matan, which are high hills, about twenty miles from the shore on the south side of the mouth of the river St. Lawrence, and about 200 miles from Quebec, where the sea is as boisterous as the ocean; a thick fog came on, with the wind from the eastward, blowing a fresh gale, and a considerable sea was running; the ship took in sail, and continued tacking under easy sail, the wind being from the E. to E. N. E. until the next day. On the 13th, about half-past eight o'clock, a. m., she struck, about five miles on the westward on the Quebec side of Matan, not a quarter of a mile from the shore, which was invisible from the thickness of the fog. The force of the first shock was so great that the rudder was unshipped, the lower part of the rudder case torn out, the pintles bent, and both pumps hove up, one sixteen and the other eighteen inches from their proper places. The vessel went on her larboard side, and took the ground when the tide began to ebb. Every exertion was made by the crew to keep her free, in the hopes that she might be got off when the weather moderated. At low water, the gale increasing, the sea beat over her and made her rock like a cradle. She began to fill with water, and the crew were obliged to take to their boats for the preservation of their lives. The captain went into his boat in search of assistance, but from the desolate state of the place was unable to procure any. On the morning of the 15th, the weather being moderate, the captain went on board, and found that the keel had gone fore and aft, and pieces of it were washed on shore, the stern and gripe were gone, and the ship was bulged, hogged, and twisted in such a manner that he considered it impossible to make her seaworthy. After ordering the mate to unbend all the light sails, he went to Matan, a village of about six houses, occupied by some pilots and fishermen, to try if he could procure assistance; but all the help he could obtain was a schooner of about fifteen tons burthen, with a crew of three or four hands; but judging it imprudent to haul the ship off the rocks, if it were practicable, with such means, and apprehending that if it came on to blow hard, the ship would, in the position she lay, be beaten to pieces, he determined, after having removed the spare sails and stores into the schooner, to return himself to Quebec, and advise with the merchants to whom he was addressed, what was best to be done under all circumstances. On the 24th he arrived with great difficulty, in an open boat, at Quebec, and after a consultation with the merchants to whom he was addressed, and the resident agent of Lloyd's, it was deemed expedient to call a survey, and sell the vessel to the best advantage. Three experienced persons were then appointed to make a survey, and accordingly they went down to the vessel, and after a careful examination they gave it as their opinion, that the expense of getting her off the place she then was, if it could be accomplished, and repairing her, would far exceed her value when repaired; and taking all the circumstances into consideration, and from every appearance of the vessel, they judged that for the benefit of all parties concerned she should be publicly advertised for sale at Quebec, and sold at the place where she then lay. Accordingly she was advertised and sold by public auction on the 4th of August, to a ship-builder at Quebec, who purchased the hull, tackle, stores, &c., at the price of about 1000*l.*, including the ship's register. The purchaser got her off the rocks, and she was towed in about seven weeks to Quebec by a schooner part of the way, and the remainder by a steam vessel. He then put her into a state of repair, the expense of which amounted to about 1,000*l.*; thirty men were employed night and day upon her for about three weeks, at the end of which time she was got off the stocks, and took in a cargo of timber for Great Britain. In November she put to sea; but when she got into the Gulf of St. Lawrence she became leaky, and drove on Prince Edward's Island, where she was totally lost, and several of her crew were drowned. It appeared that several

of the crew who had been hired by the purchaser refused to sail in her, and those who went had been hired at extraordinary high wages. The captain and the mate both deposed, that when the vessel was repaired as abovementioned they would not have trusted their lives in her. One of the seamen upon the voyage said he was obliged to leave her after she had put to sea, in consequence of her leaky state; at the time he left her she was full of water. It was proved that it would have cost 3,000*l.* to render the vessel seaworthy, exclusive of the expense of getting her off the rocks, &c. The present action was brought for a total loss, giving the underwriters credit for the amount at which the vessel was sold. The plaintiff had neglected to abandon to the underwriters. It was contended on the part of the defendant: 1st. That this is not a total, but an average loss, with benefit of salvage, because the ship remained in specie, and could not therefore be said to be totally lost. 2ndly. That, at all events, a notice of abandonment was necessary in order to support an action for a total loss. The Lord Chief Justice told the jury that if they thought the vessel could not be repaired without an expense fully equal to her value when repaired, he was of opinion, in point of law, that it was a total and not an average loss, and that notice of abandonment was not necessary to enable the plaintiff to recover. The jury found for the plaintiff for the full amount claimed.

Per Cur. It seems to us, that if the questions now propounded are ever to be raised by a bill of exceptions, or other more solemn mode of proceeding, [460] this is the most unfavourable case on the part of a defendant in which such questions could be raised; for, upon the facts proved in evidence, the case admits fairly of no doubt whatever, if we are right as to the legal principle upon which it is to be decided. What is the case upon the evidence? By means of one of the perils against which the policy insures, the ship which is the subject of insurance, ceases to retain the character of a ship, and is, properly speaking, a wreck, and consequently entitles the assured to recover as for a total loss. It is perfectly clear that the assured was at liberty to sell the ship in the state in which she was; and if he made a sale, he is entitled to recover from the insurers as for a total loss, without making any abandonment whatever. That was solemnly decided in the Court of Common Pleas, in *Idle v. The Royal Exchange Assurance Company*, 3 Moore, 115. But we do not rely upon that case so much, because there was afterwards a writ of error brought upon the judgment of the Common Pleas, which shows that some of the parties interested were not satisfied with the decision. What ultimately became of that case we have not the means of knowing; see 6 T. B. Moor, 397. But we rely more upon the case of *Read v. Bonham*; although our brother Richardson differed in opinion from the other judges in the decision of that, yet he did not differ from the general legal principle on which it was founded. He thought, indeed, that it was very questionable whether the facts were such as to justify the sale, and he was of opinion that the case ought to go to the consideration of another jury, as to whether the facts did justify a sale or not. But it does not appear there was any doubt in his mind, if the sale was necessary, that the assured would have been entitled to recover as for a total loss. Now, in this case, was the sale justifiable or not? Upon the evidence of the captain (whose testimony is not contradicted) he considered her a wreck. The purchaser of the vessel was about seven weeks removing her to Quebec, a distance only 220 miles. An expense of about 1,000*l.* is incurred in repairing her; but after she is repaired and after the expense was so incurred, was she properly entitled to the character of a ship? The captain said he would not trust his life in her; the mate gave testimony to the same effect; and a third man, who was hired to go on board her, as a mariner, at a higher rate of wages than ordinary, said that without any extraordinary bad weather she became unfit for the voyage before she left the Gulf of St. Lawrence, and was so full of water that he left to avoid the imminent peril of his life. What does this evidence imply? Why, that after an expense of 1,000*l.* incurred in repairing the ship (she being valued at 3,000*l.*) she could not be made seawor-

thy. Under these circumstances, we are of opinion that this was a case in which the sale of the ship was justifiable. All the witnesses agreed in this proposition, that a new ship might have been built at the expense which was necessary to make the vessel properly seaworthy. Then this clearly is a total loss; because the vessel was originally insured as a ship, and at the time she was sold she ceased to have that character.

- [461] 20. *GREEN V. ROYAL EXCHANGE ASSURANCE COMPANY.* H. T. 1815. C. P. 1 Marsh. 449; S. C. 6 Taunt. 68;

Freight is insured from A. to B.; the ship sails, but is obliged to put back from stress of weather when she is found to be incapable of complete repair and the cargo is accordingly unloaded and the ship sold. In an action on the policy for a total loss,

Per Cur. We are of opinion that there is no ground for saying that there should have been an abandonment in this case; but we think that if the ship had brought home cargo, that would have been a salvage on the original freight; for though, when the cargo was taken, on board, the insurance was on that specific cargo, yet, if the ship, having beendriven back to her original port of lading, had taken another full cargo on board at a lower freight, the plaintiff would only have been entitled to have recovered the difference. So, if the ship had been repaired sufficiently to bring home a smaller cargo, that would have been a salvage out of what she would have earned had the voyage been prosperous. We think the insured ought to have acted as if the adventure had not been insured; and if a man of common prudence would have repaired her for his own advantage, not being insured, he should have done so on account of the underwriters, otherwise he would have been selling the ship for the purpose of throwing the loss on the underwriters. The case, therefore, should go to another jury to consider whether, in point of fact, the ship was sold for that purpose, or whether the plaintiff or his agent pursued the same course as if he had not been insured, in which case he would be entitled to recover as for a total loss. The only point to which our attention was directed at the trial was the question of abandonment.—Rule absolute for a new trial.

21. *Goss v. WITHERS.* M. T. 1758. K. B. 2 Burr. 683. S. C. 2 Lord Raym. 325.

This was a special case upon two actions on two distinct policies of insurance, one upon a ship and the other upon the loading. The former was an insurance on the *David and Rebecca*, at and from Newfoundland to her port of discharge in Portugal or Spain, without the Straits, or England, to commence from the time of her beginning to load at Newfoundland for either of the above named places; and to continue till she should be arrived at her said port of discharge, and there moored 24 hours, at anchor, in safety. The ship was by agreement, to be valued at the sum subscribed, without further account. The insurance was to be at ten guineas per cent., and in case of loss, to abate 2l. per cent., and in case of average loss not exceeding 5l. per cent. to allow nothing towards such loss; and if the vessel was discharged without the Straits, excepting the Bay of Biscay, two guineas per cent. were to be returned, and if she sailed with convoy and arrived, two guineas more per cent. were to be returned. The plaintiff declared upon a total loss by capture by the French. The policy declared upon in the other action was an insurance upon any kind of lawful goods and merchandize, laden or to be laden on board the aforesaid ship, and this policy for 7l. 7s. insured 70l. The declaration alleged that divers quantities of fish and other lawful merchandizes, to the value of the money insured, were put on board, to be carried from Newfoundland to her port of destination, and so continued, except such as were thrown overboard, as is after mentioned, till the loss of the ship and goods. The declaration then avers that a part of the said goods were necessarily thrown overboard in a storm, to preserve the ship and the rest of the cargo, after which jettison the ship and the remainder of the goods were taken by the French. The case states that the ship departed from her proper port, and was taken by the French on the

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23rd of December, 1756, and that the master, mates, and all the sailors, except an apprentice and a landaman, were taken out and carried to France: that the ship remained in the hands of the enemy eight days, and was then retaken by a British privateer, and brought in on the 18th of January to Milford Haven, and that immediate notice was given by the assured to insure, with an offer to abandon the ship to their care. It was also proved at the trial, that before the taking by the enemy, a violent storm arose at sea, which first separated the ship from her convoy, and afterwards disabled her so far as to render her incapable of proceeding on her destined voyage without going into port to refit. It was also proved that part of the cargo was thrown overboard in the storm, and the rest of it was spoiled while they lay at Milford Haven, after the offer to abandon and before the ship could be refitted; and the assured proved their interest in the ship and cargo to the value assured. Several questions arising upon the trial of the first of these causes, it was agreed that the jury should bring in their verdict in both causes for the plaintiffs, as for a total loss, subject, however, to the opinion of the Court on the following questions: viz. 1st. Whether this capture of the ship by the enemy was or was not such a loss as that the insurers became liable thereby? 2ndly. Whether, under the several circumstances of this case, the assured had or had not a right to abandon the ship to the insurers after she was carried into Milford Haven? After two arguments, the Court decided unanimously in favour of the plaintiff; and in the opinion then delivered by Lord Mansfield all the law upon this subject was fully discussed. It will not be necessary, however, to state in this place what fell from his lordship upon the first of these questions thus submitted to the opinion of the Court. It will be sufficient then to follow his lordship in the second part of his argument.

Lord Mansfield. The single question, therefore, upon which this case turns is, whether the insured had, under all the circumstances, an election to abandon on the 18th of January, 1757? The loss and disability were in their nature total at the time they happened. During eight days the plaintiff was certainly entitled to be paid by the assurer as for a total loss, and in case of a recapture the insurer would have stood in his place. The subsequent recapture is, at best, a saving only of a small part; half the value must be paid for salvage. The disability to pursue the voyage still continued. The master and mariners were prisoners; the charter-party was dissolved; the freight (except in proportion to the goods saved) was lost; the ship was necessarily brought into an English port; what could be saved, might not be worth the expense necessarily attending it; which is proved by the plaintiff's offer to abandon. The subsequent title to restitution, arising from the recapture at a great expense, the ship too being disabled from pursuing her voyage, cannot take away a right vested in the insured at the time of the capture. But because he cannot recover more than he has suffered, he must abandon what may be saved. I cannot find a single book, ancient or modern, which does not say, that in case of a ship being taken, the insured may demand as for a total loss and abandon. What proves the proposition most strangely, is, that by the general law he may abandon in the case merely of an arrest, or an embargo, by a prince not an enemy. Positive regulations in different countries fixed a precise time before the insured should be at liberty to abandon in that case. The fixing a precise time proves the general principle. Every argument holds stronger in the case of the other policy with regard to the goods. The cargo was in its nature perishable from Newfoundland to Spain or Portugal, and the voyage was as absolutely defeated as if the ship had been wrecked, and a third or fourth of the goods saved.

22. BROTHERSTON. v. BARBER. M. T. 1816. K. B. 5 M. & S. 418.

Insurance on a ship from Rio de Janeiro to Liverpool; and the ship was captured, and afterwards recaptured; but in the interval, the assured, having received intelligence of the capture, gave notice of abandonment; and after the recapture the ship arrived at Liverpool, having sustained a partial damage; and action brought to recover a total loss.

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Where an insurance was effected on ship from Rio de Janeiro to Liverpool, and the ship was captured and af

terwards re captured, but in the interval, the insured, having received intelligence of the capture, gave notice of abandonment, and after the recapture the ship arrived at Liverpool, having only sustained a partial loss, it was held that only a partial loss could be recovered.

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On a policy on goods, the underwriters were held only to be liable for an average loss where the ship, being captured and recaptured, was sent in to port stripped of all her hands, and the captain, not being able immediately to procure a fresh crew, or to raise money to pay the salvage sold the ship and cargo, and broke up the adventure.

In case of seizure and detention, or barratry, if the insured be afterwards in demnified by a restor

Per Cur. We think the plaintiffs are not entitled to recover more than 2*l.* 9*s.* 4*d.* beyond the sum paid into Court, that is, the amount of the damnification at the time when the action was brought. This is a contract of indemnity only. The ship was captured in the course of her voyage. Now, capture is an event which may or may not terminate in a total loss: if it continue and terminate in a total loss, the assured will be entitled to full indemnity; but if the capture be only temporary, and the loss partial, it would be against the spirit as well as the letter of the contract to hold the underwriter to take the subject matter-insured, and to allow the assured, who stipulates only for indemnity, to come upon the underwriter for the whole amount of his subscription, while the subject-matter insured subsists in perfect safety. What is it that is thus to entitle the insured to demand more than the safety of the thing insured? It is said that abandonment gives this right, by closing the transaction between the underwriter and assured; but notice of abandonment is no more than a proposal on the part of the assured, which the underwriter may accept, and then there will be a new agreement between them, binding on both parties. But while the transaction rests in abandonment only on one side, the underwriter's responsibility may vary, and cannot amount to a total loss, if by subsequent events it has become otherwise at the time of action brought. It is unnecessary to give any opinion as to how the case might be if the loss, continuing total at the time when the action is brought, became a partial loss only at the time of trial. It is enough here that the thing remained in safety to the assured at the time when this action was brought, and the loss was only temporary. Consequently the verdict for the plaintiffs must be entered for the limited sum only.

23. *UNDERWOOD v. ROBERTSON.* H. T. 1815. N. P. 4 Campb. 138.

The underwriters on goods insured from London to Demerara, were only liable for an average loss where the ship, being captured and recaptured, was sent into St. Thomas's, stripped of all her hands, and the captain, not being able, on his arrival there, to procure a fresh crew, or to raise money to pay the salvage, immediately sold the cargo, and broke up the adventure.

Lord Ellenborough. In this case, although the captain could not at first procure a competent crew to navigate his vessel, he ought to have waited a reasonable time for the purpose. Ships that came in might have spared him assistance, or seamen might possibly have been obtained from the neighbouring islands. But having arrived at St. Thomas's on the 12th, he, on the 15th, gets a decree from the Vice-Admiralty Court at Tortola, for the sail of the ship and cargo. I conceive, that under these circumstances he had no right to sell the cargo. To enable him to pay the captor's freight, he was bound to have tried, and to have tried seriously and deliberately, every other expedient to raise money before disposing of any part of the goods intrusted to his care. It does not satisfactorily appear that he might not have raised the money by drawing on his owners, or by hypothecating the ship. He came to his conclusion in three days. The sale of the cargo was only to be resorted to in the last extremity, when every other expedient had failed, and every other resource was hopeless. I think the underwriters are liable for the salvage and plunderage, and no further. There was here no loss of the adventure by any peril insured against. Even if the ship insured was prevented from completing the voyage, it does not appear that the goods might not have been forwarded to their place of destination by other vessels.

24. *M'MASTERS v. SCHOOLBRED.* M. T. 1794. N. P. 1 Esp. 257.

In an action on a policy for six months, where the ship had been captured and carried into Charlestown, sold by the captors, by the authority of the French consul there, and purchased by the captain for account of the original owners; the question to be considered was, whether it be a partial loss, or the owners could abandon?

Lord Kenyon said, it was impossible to make this more than an average loss; that a policy of insurance was a contract of indemnity, to which, and

which only, the insured had a right to look. This was the language of *Roccus*, and its principle had been adopted in every decision on the subject; it had been decided that if a ship had been sunk and weighed up again, if it was restored to the owners, they had only a right to go for an average loss. Such also was the case of ransoms. That in the present case the captain was to be considered as the agent for the owners, as recovering so much property on their account, and that they had therefore a right to recover only so much as was the amount of the injury their property had sustained, which was an average loss; and the only question would be for the jury to calculate, whether the 60l. per cent. paid into court covered the whole of the loss the insured had sustained or not.

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25. *MULLETT V. SHEDDEN*. H. T. 1811. K. B. 13 East, 304. S. P. *MEL- LISH V. ANDREWS*. H. T. 1812. K. B. 15 Id. 13. *BOUDRETT V. HEN- TYG*. E. T. 1820. N. P. Holt, 149; S. C. 5 B. & A. 597.

An American, properly licensed to export saltpetre from Calcutta to Ameri- ca, having insured it for the voyage; the ship was seized by the cap- tain of a British ship of war at the Cape of Good Hope, and the cargo con- demned, unshipped, and sold, by order of the Court of Admiralty there, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the cap- tor's costs. The Court held that the assured might recover as for a total loss, without notice of abandonment, the thing insured being wholly lost to the own- er by the unshipping and sale of the commodity at the Cape, under the order of the court there; and that such loss was recoverable against the underwriters on a count alleging it to have happened by the unlawful seizure and detention of a British ship of war, however questionable it might have been, if notice of abandonment had been necessary, whether such a notice, not given till after the receipt of a second letter from the Cape, announcing the condemnation, landing, and sale of the goods, were in time, when a prior letter of advice had stated the seizure and detention, on which no notice had been given; and held that the court of appeal allowing the captor his costs on the reversal of the sentence of condemnation did not the less show the original seizure and de- tention to be unlawful, as alleged in the count.

26. *BARKER V. BLAKES*. H. T. 1808. K. B. 9 East, 283.

This was an action on a policy of insurance, dated the 4th of August, 1800, on a quantity of oil belonging to an American proprietor, shipped on board an American ship, the *Hannah*, on a voyage to and from New York to Havre de Grace.

Per Cur. The whole amount of loss claimed on the part of the plaintiff is 45l. 2s. 8d., consisting of 20l. 19s. the freight and expenses paid under the sentence of the Court of Admiralty, and 24l. 3s. 8d., the difference, we pre- sume, between the invoice value of the oil in America, and the proceeds of the sale here. The defendant contends, that the plaintiff is at any rate not entitled to recover the latter item of loss, his claim thereto is merely found- ed on an abandonment, which was not made, as the defendant insists, in due time. But he further contends, that the plaintiff cannot by law recover at all, even to the extent of the average loss of his freight and expenses, under this policy; and that, to allow of such a recovery, would be to allow of an indem- nity being afforded, through the medium of British insurance, to neutrals act- ing in contravention of the interests and policy of Great Britain, in the carry- ing of the goods of its enemies; that in so doing, the neutral ship had in effect violated the duties of his neutrality, and assumed a hostile character in respect of this country. But it does not appear to us that this general objection to the plaintiff's right to recover is well founded. In order to entitle himself to re- cover as for a total loss, the plaintiff must establish two things: 1st. That a loss of the voyage, the only description of loss which can be contended for in this case, as the goods themselves have been ordered to be restored, and are capable of being so, was occasioned by the detention in question, which con- tinued until and after the blockade took place, which rendered the prosecution

A neutral ship bound from America to Havre, was detained and brought in to a British port for the purpose of search, and pending proceedings in the Admiralty Court, the King declared Havre in a state of blockade, by which the further prosecution of the voyage was prohibited; this was held to en

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title the neu of the voyage to Havre no longer practicable; and 2ndly. Supposing a loss so
tral insured occasioned to be a total loss by detention, within the policy, that the abandon-
to abandon. ment of the goods was made in due time. And thinking, as we do, that the
impossibility of prosecuting the voyage to the place of destination, which
arose during and in consequence of the prolonged detention of the ship and
cargo, may be properly considered as a loss of the voyage, and such loss of
voyage, upon received principles of insurance law, as a total loss of the goods,
which were to have been transported in the course of such voyage, provided
such loss had been followed by a sufficiently prompt and immediate notice
of abandonment. We are of opinion, however, upon established
principles, that this abandonment, which was made on the fourteenth of
October, 1803, above five weeks after the blockade of Havre had been
publicly notified, the latest event to which the loss of voyage is capable of
being referred, was not made within those reasonable and convenient limits
of time which the law allows for this purpose; and it is to be observed, that
no excuse for the lateness of the abandonment is offered, on the score of any
want of competent powers in the parties making the abandonment, as they do
not appear to have been furnished with any other powers for this purpose at
best than what they must be supposed to have originally possessed, if they ever
had any. The loss in question must, therefore, for want of a timely notice
of abandonment, be regarded merely as an average loss, and the verdict must
of course be restricted to the sum of 20*l.* 19*s.*, the amount of the freight and
expences, to which the assured was subjected by the sentence of the Court
of Admiralty. Judgment for that sum, and no more, must be given accordingly.

27. *FALKNER v. RITCHIE.* H. T. 1814. K. B. 2 M. & S. 290.

Insurance on ship. The ship during her voyage, while loading her home-
ward cargo, was seized by the crew and carried away to a distant country,
and her cargo plundered, and the ship deserted, but was afterwards retaken by
another ship, and was brought with a small remaining part of her cargo to an
English port (not the port of her destination), and part of her rigging was
gone, and she could not be made fit for a voyage again without considerable
expence in providing a crew and stores.

The gener-
al rule is,
that the loss
of a voyage
does not en-
title the in-
sured to a
abandon.

Per Cur. We decided this case in effect within these few days. And so in
Anderson v. Wallis, 2 M. & S. 240. the loss of the voyage was as complete
as in this case. That was an insurance on goods; the ship had been driven by
stress of weather into Kinsale, and the goods were forced to be relanded,
and the voyage was lost for the season. The question was, whether the assur-
ed could abandon? And it was held that a retardation of the voyage was not
a ground of abandonment, the goods still subsisting in specie. And in *Eve-
reth v. Smith*, 2 M. & S. 267, to which we at first alluded, the Court recognized
that decision, and applied it to a case of freight, and held that a loss of the
voyage contemplated by the assured was not a loss of the freight, freight hav-
ing been afterwards earned. As to *Goss v. Withers*, there may be some
doubt whether it is similar to the present case; and we must say that there is a
looseness and generality in the expressions which have been borrowed in argu-
ment from that and the other case that make one inclined to pause upon them.
What has a loss of the voyage to do with the loss of the ship? On this subject
there is so much good sense in the judgment of Chief Justice Willes, in *Pole
v. Fitzgerald*, Wiles, R. 641. that it may be of great use to resort to it in order
to purify the mind from these generalities. See 2 Dow. Rep. 474; 3
B. & B. 108.

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28. *DIXON v. REED.* E. T. 1822. K. B. 1 D. & R. 207; S. C. 5 B. & A. 597.

Barratry of
the master
is a ground
of abandon-
ment, or for
a total loss,
though, the

Action to recover a total loss upon a policy of insurance. It appeared in
evidence that the ship sailed on the voyage insured, with about 260 loads of
timber on board, but instead of proceeding direct to her place of destination,
was carried by the master to Barbadoes, where she was condemned and sold.
Part of the timber was also sold at that place to pay the expenses and charges

incurred there, and the remainder was shipped on board another vessel, called the *Richard and Sibella*, and forwarded to London, to which place the Governor *milne* was destined. The plaintiffs abandoned, as for a total loss by the bar-^{mately reach their destination through the agency of strangers to the assured.}trary of the master; and the jury, under the directions of the learned judge, found a verdict for a total loss on that ground. In Hilary term the defendant moved for a new trial, but the Court refused the rule; after that motion had been disposed of, the defendant obtained a rule, calling on the plaintiff to show cause why the verdict should not be reduced by the amount of that part of the cargo remitted to this country, at the valuation in the policy, viz., 12l. per load, subject to the expenses incident to the reshipment, seamen's wages, &c. *Per Cur.* There is a great difference between the case of the retardation of a voyage occasioned by the elements, and that occasioned by the bar-^{mately reach their destination through the agency of strangers to the assured.}trary of the master. The cases of *Anderson v. Wallis*, 2 M. & S. 240. and *Hunt v. The Royal Exchange Assurance Company* are of the first description; but this case is totally distinguishable from those. The loss here is occasioned by the criminal misconduct of the master; and after the property gets out of his control by his misconduct it becomes a total and not an average loss. The injury arising to the plaintiff is considerable, as appears by the affidavits; because, in consequence of the retardation in the arrival of the goods, the price of the commodity is considerably deteriorated, and the assured may, if he chooses, abandon as for a total loss. No argument can be derived in favour of the defendant from the cases which have been cited, because in those the delay was occasioned solely by the weather, and was not attributable to any act of the master. We are of opinion that this is a total loss. [468]

29. *MICHELL v. EDIE* H. T. 1787. K. B. 1 T. R. 608. S. P. *ANDERSON v. ROYAL EXCHANGE ASSURANCE COMPANY*. M. T. 1805. K. B. 3 Smith, 48; S. C. 7 East, 38.

Action on a policy of insurance. The cause was ultimately referred to one of the jury, to consider what was due to the plaintiffs, who found that nothing was due; and thereupon a verdict was entered for the defendant: and now upon a motion for a new trial the following facts were reported: the ship was captured in the course of her voyage by an American privateer, and a few days afterwards, the captor having stripped her of her stores and part of her rigging, and having taken out some of the hands, set her at liberty. There was a clause in the policy to exempt the underwriters from average losses under 3l. per cent; and the part of her cargo taken out did not amount to that sum. In consequence of this loss of part of the crew, it became impossible for the ship to pursue her voyage, and she was obliged to bear away to Charlestown, where she arrived on the 18th of February, 1782; she was there put into the hands of one Cruden, who was a part owner in the ship, and had likewise been engaged with one of the plaintiffs in former transactions. Cruden in June, 1782, sold the cargo, and received the whole profits of the sale, but remitted home no part of them. In his books he had given the underwriters credit for the amount. At the time of the sale he was in bad circumstances, and afterwards became insolvent. In June, 1783, Cruden came to England, and several applications were made to him on the part of the plaintiffs by Abel, who had concerns with the plaintiffs as well as with Cruden, and who said at the trial that the plaintiffs had looked to Cruden for payment for two or three years, during all which time no notice of abandonment had been given by the plaintiffs to the underwriters. Lord Kenyon C. J., then stated, that the first question which had been made was, whether the plaintiffs were entitled to recover as for a total loss. And as to this, he was of opinion that as there had been a capture, which for a time had occasioned a total loss, the owners had the option to abandon or not as they pleased; but if they chose to abandon, they ought to have done it immediately upon receiving intelligence of the loss; and that as they had not done so, but had looked to Cruden as their agent for payment, he was of opinion that they had waived their right to abandon, and could only recover as for an average loss. Another question was then made, how far the plaintiffs were entitled to an average loss above the sum paid into court, ^{When an abandonment is requisite, it must be made as soon after the news of the loss has reached the assured as possible.}

[469] which amounted to the difference between the produce of the sales at Charlestown and the invoice; as to which, the plaintiffs contended that they were entitled to recover from the underwriters a charge of 5*l*. per cent. commission on selling at Charlestown, and 5*l*. per cent. more for remitting; that it had been referred to one of the jurymen to consider what was due for average, who had awarded that nothing was due.

Per Cur. Two questions have been made in this case; 1st. Whether the plaintiffs are entitled under these circumstances to recover as for a total loss? 2nd. Whether, under reference to the arbitrator, he has done right in awarding that nothing is due to the plaintiff? As to the first, we apprehend that the general rule is, that where any part of the property insured has been saved, the assured cannot recover as for a total loss, unless he made his election to abandon and give reasonable notice to the underwriters of his intention. But it is contended that the assured never waive their right to abandon while they are managing in the best manner they can for the benefit of all concerned, and that argument is grounded on the common clause inserted in every policy, whereby they are authorized "to sue, labour, and travail, without prejudice to the insurance." Now this clause does not, in our apprehension, warrant the position in so large an extent as it is contended for. It seems to us that the meaning of that clause is, that till the assured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandonment; and that is reasonable, because in general the parties live in this country, and the loss may happen at a great distance, so that they cannot exercise their judgment immediately; it is, therefore necessary, that the master who is on the spot, should do the best he can; yet we think that the assured are bound to decide, and signify their election to the underwriters, whether they will abandon or not, the first opportunity; and for this reason, that though the person who takes upon him to act on the occasion for the benefit of all concerned is not the agent of the assured, yet if they receive notice of the loss, and do not elect to abandon to the underwriters, then they adopt the acts of such person, and make him their agent. This is something like the notice which is necessary to be given to the drawer of a bill of exchange in case of non-payment, which if the holder omit to do, he is considered as giving credit to the acceptor, and, therefore, the loss, if any, must fall on him. There may be cases where previous acts of the master may not make him the agent of either party, and he only acts in common for them both, till notice is received by the parties at home. If after such notice he is continued in his agency, he becomes the agent of the party by whom he is so confirmed; but he cannot be considered as the agent for the underwriters till notice has been given to them, and they have had an opportunity of exercising their discretion, whether they will or will not continue him; though, till notice of the loss was first received by the assured, the property continued at the risk of the underwriters. Here it is plain that during the course of near three years Cruden was considered by the assured as their agent; credit was given to him in that character; frequent applications were made to him for payment; and till his insolvency there was no appearance of any intention to disown him; that was the first moment when the assured thought of abandoning. As to the second ground of objection, the reference to the arbitrator was to determine what was due for average. Now, supposing that, instead of saying that nothing was due, he had said that 4*l*. 5*s*. per cent. was due; it could not have been contended that he had done wrong. This is precisely the same thing, for so much has already been paid into court, and there is nothing more due. This is right in substance; and there seems to be no ground for the Court to grant a new trial for his inaccuracy in point of form, when they see that strict justice has been done between the parties.

30. GERNON v. ROYAL EXCHANGE ASSURANCE COMPANY. M. T. 1815. C. P. 2 Marsh, 88; S. C. 6 Taunt. 383.

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The insured is entitled

Action on a policy of insurance. It appeared that the ship sailed on the

first of December, 1814, but from stress of weather was obliged to put back to Liverpool about the 20th of that month, and that on the 21st, the protest was made; that the goods were immediately landed and surveyed; that the plaintiffs in London received the following letters from their agents at Liverpool, through the medium of the insurance-broker: the first, dated the 20th December, simply stated its return, and that the cargo was to be examined the next day; the second, on the 24th of December, stated that the damage was not so great as supposed, and that it was intended to send the cargo on; the third, on the 29th of December, that a great many boxes were damaged, but that it was still in contemplation to send the rest of the cargo on; lastly, a letter of the 7th of January, 1815, communicating the result of a final examination of the goods by brokers, who gave it as their opinion that the sugars were all more or less damaged, and that it would be advisable to sell them on account of the underwriters; that the result of this survey was received by the plaintiffs on the 9th of January, and it was immediately handed over to the underwriters accompanied by a notice of abandonment, and that the underwriters desired the plaintiffs to act as if they were not insured. The Chief Justice left it to the jury to say whether, supposing the cargo to have been uninsured, it were in a fit state to be forwarded on the voyage; and they being of opinion that it was not, his lordship considered that the plaintiffs were entitled to abandon, provided the abandonment was intime; and that, as the cargo consisted of a perishable commodity, the insured ought to have time to examine into the state of it before they made their election. The jury found a verdict for the plaintiffs as for a total loss.

Lord Chief Justice Gibbs. It is perfectly true that the insured are bound to make their election in the first instance, whether they will consider the loss as a partial loss and keep the goods, or as a total loss and give them up to the underwriters. That is the law in all cases where the insured have their option to abandon or not. But it is equally true, that by the first instance is meant the earliest opportunity after they have examined into the state of the cargo, and they must have an opportunity of doing that, because it is only by the result of that examination that their decision can be ultimately determined. Let it not be supposed that I accede to what has been said on the part of the defendants, that the insured might thus be forming their determination by the rise or fall of the market; they certainly have no right to govern themselves by any such rule; all they are entitled to is a reasonable time for examining the actual state of the cargo, with reference to the existing state of the market to which the goods are destined. Now it is certain that, in the present case, when the ship arrived, the insured, or, rather, their agent, thought the damage which had been sustained not so great but that part of the cargo might be forwarded; they, therefore, then considered it as only an average loss, and so they considered it on the 24th and 29th of December; and if on the 29th they could have had a full knowledge of every thing necessary for their decision, they ought then to have determined; but we must suppose that, at that time, the cargo had not undergone a sufficient examination, and that afterwards, finding that it was not in a fit state to be forwarded, the plaintiffs gave up that intention. They could not have set up this defence, if they had been in possession of the same knowledge on the 29th that they ultimately obtained, and if they had been dilatory on the subject, though I think they ought not to be pressed too hardly on that point, but if they had slept over the business, that to be sure would have been sufficient to deprive them of their right to abandon; but as the contrary appears to have been the case, and as the jury found that the goods were not in a condition to be forwarded, I think there is no ground for saying that the insured were not entitled to abandon, or that the abandonment was made too late.

31. ALLWOOD V. HENCHALL. M. T. 1795. 1 Park, Ins. 280.

Case on a policy of assurance on linen, on board the *Amphitrite*, at and from London to Jamaica. The *Amphitrite* was taken by a French privateer, within a few leagues of Jamaica; part of the property insured was plundered

led to a reasonable time for examining in to the state of a damaged cargo before he makes his election on the question of abandonment.

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And is not bound to abandon in

any case, but he must make his election quickly, and cannot lie by and treat the loss as an average loss, and take measures for recovery, without communicating that fact to the underwriters, and letting them know the property is abandoned.

and faken out of the ship. The captain, boatswain, and all but seven men were taken out of her; a fortnight after she was captured, as the captors were making their way to America, the ship, with the remainder of her cargo, was retaken by an English frigate, and taken under a prize master to Antigua. The ship and cargo were both sold, under a decree of the Vice-Admiralty Court of Antigua, by a prize agent, who received the proceeds, and was to pay them over to the party concerned, upon payment of one-eighth salvage, pursuant to the last prize act. The capture and recapture were entered at Lloyd's on the 15th of February, 1795; but it was not known where the ship was carried till the 30th of March, when a letter was received at Lloyd's addressed to the owners, freighters, and underwriters of the ship *Amphitrite* and cargo, from the judge of the Vice-Admiralty Court of Antigua, informing them of the arrival and sale of the ship and cargo, under a decree of the court, and desiring to have some agent appointed to remit the proceeds to England. Powers of attorney were sent out in April, by the assured, for this purpose; and the proceeds were desired to be remitted to the banking-house of Smith, Payne, and Smith, one of which gentlemen was agent to the assured. The defendant was acquainted in April of the loss, but no abandonment was proved to have been made till August, near four months after Mr. Payne, who was the plaintiff's agent, had sent out the power of attorney. On the part of the plaintiff it was contended that, admitting there was no abandonment, in this case the property having been absolutely sold and converted into money before the parties knew where the ship was taken to, the loss was absolutely total in its nature, and therefore there was no occasion for an abandonment.

Lord Kenyon, though he did not give any decided opinion upon this point, was inclined to think that an abandonment was necessary, and that the case was the same as if the property had remained in specie at Antigua, and had not been sold; that the assured is not bound to abandon in any case, and might in case the sales had been very advantageous, have taken the benefit of them, in the same manner as he might have retained this property if it had remained in specie. But the assured must make his election speedily, whether he will abandon or not, and put the underwriter into a situation to do all that is necessary for the preservation of the property, whether sold or unsold; he cannot lie by and treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them.

32. *ABELL v. PORTS*. M. T. 1800. N. P. 3 Esp. 242.

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Upon the first notice of a total loss, the assured are bound to abandon, but it must appear that they had no notice, or the policy will not be vitiated.

The ship was taken by the French and carried into Guadaloupe, where the colony being in want of her cargo, they took it out and compelled her to take in a cargo of the produce of that island, with which she sailed; she was afterwards captured on the 20th of September, 1793, by a British ship, and carried into Nevis, where the cargo was condemned. There was a memorandum on the policy, that the loss was to be adjusted within three months after advice of the ship being captured. The defendant relied on the circumstance that he had had no notice of the loss of the ship. The broker who effected the policy was called: he could prove no direct notice having been given to the defendant, but said he had no doubt that notice had been given.

Mr. Justice Le Blanc. With respect to the point, that the assured ought not to have taken to the second cargo which was imposed on him, but to have abandoned it, the proposition of law is a true one,—that if there is at any time a total loss, and afterwards a change of circumstances takes place, the assured is bound to make his election, and he cannot try to take advantage of it, and to be determined by the event, if it is profitable or not; but to make this rule of law attach to this case, it must appear that there was a time when the assured was conscious of the change of circumstances. There is no evidence of the plaintiff's having taken to the second cargo. It does not appear that the assured had any notice of the loss until the vessel was captured and carried into Nevis, on her second voyage; at that time, therefore, he had nothing to abandon. I am therefore of opinion that the policy is not discharged, by reason of the plaintiff's not abandoning.

33. ALDRIDGE V. BELL. M. T. 1816. N. B. 1 Stark. 498.

Action on a policy of insurance upon the ship *Lion*, at and from Ferrol to London. One question was, whether an abandonment had been made in time? The *Lion* arrived at Kinsale on the 24th of November, the cargo was taken out on the 1st of December, and a survey was had on the 2nd, and also another on the 14th of December, when it was found that the repairs would exceed the value of the ship. The course of communication between Kinsale and London, where the insurers resided, was usually four or five days. The notice of abandonment was given on the 6th of January.

Lord Ellenborough held, that the abandonment was clearly out of time.

34. READ V. BONHAM. M. T. 1818. C. P. 6 Moore, 397; S. C. 3 B. & B.

147. S. P. KELLY V. WATSON. M. T. 1806. N. P. 2 Campb. 155.

Insurance for 8,000*l.* on ship *Victoria*, and 4,000*l.* on freight, at and from London to the East Indies and back. The ship sailed seaworthy from Calcutta on her voyage home, when, in addition to some damage which she sustained in the river Hooghly, she encountered two storms at sea, by which she was so shattered as to render it necessary for the captain to put back, and he returned to Calcutta on the 30th of August, 1820. On his arrival at Calcutta he gave notice of abandonment to the agent for Loyd's resident there, and requested that their surveyor might be present at the surveys of the ship. The agent said they had no authority to accept the abandonment; but their surveyor attended the surveys, when it was found that the ship was so seriously damaged, that the expense of repairing her would be nearly 5,000*l.* The agents refused to undertake the repairs, and the captain having in vain attempted to borrow money for that purpose, by hypothecation of ship, sold the ship for 1,200*l.*, conceiving that to be the best course for all parties. On the 25th of April, 1821, the captain arrived in London, where the owners resided; and on the 3rd of May the ship's papers were delivered. On the 5th of May the ship's broker abandoned to the underwriters. In an action on the policy on the ship, the jury having found a verdict for the plaintiff as for a total loss, and that the captain had sold the ship for a justifiable cause, the Court (*dissentiente* Richardson, J.) refused to grant a new trial, which was moved for on the ground that the ship ought not to have been sold, and that notice of abandonment had not been given in due time.

35. THOMPSON V. ROYAL EXCHANGE ASSURANCE. M. T. 1812. K. B. 16 East, 214. DAVY V. MILFORD. E. T. 1812. K. B. 15 Id. 559; 7 Taunt.

154. GLENNIE V. THE LONDON ASSURANCE COMPANY. H. T. 1814. K. B. 2 M. & S. 371.

The policy contained a clause making the underwriters free from particular average. The ship with her cargo on board, was driven from her anchor at Heligoland and wrecked; but the goods in question were afterwards got on shore and saved, though in a very damaged and unprofitable state; and the ship was obliged to be broken up. The assured gave immediate notice of abandonment.

But Lord Ellenborough C. J. nonsuited the plaintiff, upon the construction of the clause as to particular average. All the goods were got on shore and saved, though in a damaged state. If this can be converted into a total loss, by a notice of abandonment, the clause excepting underwriters from particular average may as well be struck out of the policy. I can only look to the time when the loss happened and the goods were landed, and then it was not a total loss, however unprofitable they might afterwards be.

36. PATTERSON V. RITCHIE. M. T. 1815. K. B. 4 M. & S. 393.

On the 4th of August, 1813, the plaintiff, who had chartered the ship *Dispatch*, on a voyage to Quebec, shipped on board her at Liverpool the goods insured, consisting of 31 puncheons of rum, 120 tons of salt, and a quantity of coals and mats, of which he was owner, for Quebec, to be delivered to certain persons there, for the shipper's account. On the 10th of August, the

Where a ship arrived at the port of Kinsale on the 24th of Nov. and on the 14th of Dec, a survey was had, notice of abandonment to the insurers in London, on the 6th of January, was held too late, the communication between Kinsale and London being usually four or five days. Where the captain of a vessel, sold which had been damaged by storm, my wealth arrived in London on the 25th of April, where his owners resided, who effect goods, in the case of a ship wreck, were brought on shore in a damaged state, so that they became unprofitable to the insured, it was held, that | 474 | the underwriters on the goods, who were freed by the policy from particular average, could not be

made liable as for a total loss by a notice of abandonment. Where, after notice of abandonment had been given a recapture took place and the ship and goods arrived at their place of destination, with the exception of a part, which was sold to pay the salvage, and another part, which had been plundered and lost in consequence of the capture and recapture, the underwriters were only held liable for a partial loss.

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A notice of abandonment is necessary though the ship and cargo have been sold and converted into money when the notice of the loss was received. The assured are bound to give notice of abandonment at the earliest opportunity; notice given five days after they received intelligence

ship sailed with her cargo on the voyage insured; and on the 27th of September was captured by an American privateer, of which capture some of the crew of the Dispatch brought intelligence to the plaintiff, who communicated the facts of the capture and arrival of the crew to the underwriters, and offered to abandon to them his interest, and demanded payment of a total loss; but the underwriters refused to accept the abandonment or pay. On the 27th of October the ship and cargo were recaptured by an English privateer, and carried to Halifax for adjudication, where eleven puncheons of the rum were sold in order to pay the salvage, on the recapture of the goods. Afterwards, in May, 1814, the ship, with the remaining goods reached Quebec in good condition, where the goods were sold for the account of those concerned; but it was discovered that owing to the capture and recapture, 188 gallons of the rum and 23 tons of the salt had been plundered and were lost. In the ordinary course, the ship and cargo ought to have reached Quebec in October or November, 1813; and it was from the causes above stated, and from the freezing of the river St. Lawrence, which sets in in November, and does not leave the river navigable until April, that they did not arrive at Quebec till the May following. The salvage and charges on the goods amounting to 209*l.* were paid out of the proceeds of the sales at Halifax and Quebec, the nett proceeds of which, after payment of such salvage and charges, amounted to 573*l.*; whereas, if the goods which were sold at Quebec had reached their destination in October or November, instead of the May following, when the market was declining, they would have netted 559*l.* more. The defendant paid to the plaintiff, without prejudice, the difference between the valued amount and the produce of the rum sold at Halifax; also the value of the rum and salt plundered and lost, and also the 209*l.* paid for salvage and charges on the recapture, which payments covered the plaintiff's loss, if it was a partial loss, otherwise, if the plaintiff was entitled to recover for a total loss. And this was the question for the opinion of the Court.

Per Cur. The point now made is that at the time of abandonment there was a complete vested right of abandonment, and that this being once vested is not done away by subsequent events. In *McIven v. Henderson*, there had been at one time a total loss, and circumstances went to show that this totality had never ceased; for the captain was obliged to deposit a sum of money by way of bail, and never had entire restitution. *Bainbridge v. Neilson* was, we believe, determined upon the authority of *Godsal v. Baldero*, which underwent much consideration, and was founded upon the doctrine of Lord Mansfield in *Hamilton v. Mendes*; and although Lord Eldon is said to have spoken with dissatisfaction of *Bainbridge v. Neilson* in the House of Lords, we confess, with all deference, we are unable to see any good reason for receding from that judgment. The principle of that and other decisions is a general one, and is this: I have a right of action for non-payment of money; the party pays me before action brought; that takes away my right of action.

(b) *Notice of*

1. *HODGSON v. BLACKESTON.* H. T. 1780. K. B. 1 Park. Ins. 240.

In the King's Bench it was held that a notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of loss was received.

2. *HUNT v. ROYAL EXCHANGE ASSURANCE COMPANY.* E. T. 1816. K. B. 5 M. & S. 47.

Per Cur. The questions which arise for our consideration are, 1st. Whether the circumstances warranted an abandonment? and, 2ndly, Whether the abandonment was made in due time? The ground on which the plaintiffs insist that they were warranted in abandoning, is that the voyage was lost, and that the loss of voyage in a case like the present is a good cause of abandonment. And the case of *Manning v. Newnham* has been relied on as an authority, importing that an assured is entitled to abandon ship and goods, in the event of the voyage being lost. But on reference to the language

of this policy, it is difficult to infer from any part of it that the assured were to be entitled to abandon on the ground of a mere loss of voyage. For suppose in this case the ship, before she set sail, had been run foul of by another vessel, but not so as immediately to sink, and the flour had been relanded, and afterwards the ship had gone to the bottom, the flour being in an undamaged state, but there being no other ship at the port capable of immediately forwarding the cargo to the place of its destination; if the argument for the plaintiffs be good, it follows that the assured, under such a state of circumstances, would be entitled to abandon. But we know of no authority that can fairly be said to go that length. There are cases, certainly, which speak of a loss of voyage as a ground of abandonment, and such cases may be conceived. For instance, if a ship were so damaged as to be obliged to land her cargo at an unfrequented place, where there was no opportunity of disposing of the cargo, and the shipowner could not procure another vessel to forward the cargo, except at an expense exceeding the value of the goods; such a case, we think, might warrant an abandonment, and throw the loss on the underwriter. But there is a great difference between the case just put and this case, where goods are safely warehoused in an undamaged state, and where there is nothing but a disappointment of voyage to constitute a ground of abandonment; for we are not warranted in supposing that the goods were in a worse condition than when they were put on board. . . On these grounds it seems to us that the assured have no right to abandon.

of the loss
was held
too late.
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3. *BAINBRIDGE v. NEILSON*. M. T. 1808. K. B. 10 East, 323; S. C. 1 Campb. 237.

The defendant had subscribed two policies, one on ship, and the other on freight of the same ship, on a voyage from Liverpool, to Jamaica. The ship was captured on the 21st of September, and recaptured on the 25th, after which the plaintiff, having received intelligence on the 30th of the capture, but not of the recapture, gave notice of abandonment on the 31st, which he persevered in after the 6th of October, when news of the recapture arrived, and that the ship was safe in port in Ireland, but which notice the underwriters did not accept. And it appeared, that instead of a total loss, there had been only been a small partial loss of 13*l*. and a fraction for salvage and charges on the policy on freight, and 15*l*. and a fraction on the ship and policy, and that no damage whatever was sustained by the ship while in the possession of the enemy. The question was, whether that which in the result turned out to be only a partial loss to a trifling extent, should, because of the notice of abandonment given when a total loss appeared to exist, be recovered as a total loss? The Court were of opinion, that they must look to the real nature of the contract in a policy of insurance, which was nothing more than a contract of indemnity, and consequently, as that which was supposed to be a total loss at the time of the notice of abandonment first given had ceased, and as only a small loss had been incurred in the salvage, that was the real amount of the indemnification which the plaintiff was entitled to receive under this contract of indemnity.

Lord Ellenborough. It has been said in argument, that the offer to abandon having been rightly made at the time, a right of action vested in the assured, which could not be defeated by the subsequent events; but that proposition is not only not true in the whole, but it is not true in its parts. The effect of an offer to abandon is truly this: that if the offer appear to have been properly made upon certain supposed facts, which turn out to be true, the assured has put himself in condition to insist upon his abandonment; but it is not enough that it was properly made upon facts which were supposed to exist at the time, if it turn out that no such facts existed, or that other circumstances had occurred which did not justify such abandonment. It may be said to be properly made, upon notice received, and *bona fide* credited, by an assured of his ship having been wrecked, whether such intelligence were true or not, and though the letter conveying it turned out to be a forgery; and yet clearly no right of action would vest in him, founded upon an abandonment made upon

[477] false intelligence, and without any thing, in fact, to warrant the giving of such notice. What is an abandonment more than this? that the assured, having heard of circumstances, which, if true, entitle him to treat the adventure as a total loss, he, in contemplation of those circumstances, casts a desperate risk on the underwriter, who is to save himself as he can. But does not all this presume the existence of those facts on which the right accrues to him to call upon the underwriters for an indemnity? And if they be all imaginary, or founded in misconception; or if at the time it had ceased to be a total loss, and there be no damage to the assured, or at least if the only damnification arise out of the very act (the recapture) which saves the thing insured from sustaining a total loss, the whole foundation of the abandonment fails. See 2 Taunt. 363.

Or even if a recapture take place after notice of abandonment, but before an action is brought, and the loss be thereby changed from a total into a partial one, the insured cannot recover for a partial loss.*

An ineffectual notice of abandonment will not preclude the assured from recovering for a total loss when the loss is total.

An abandonment not accepted cannot convert in to a total loss what at [478] the time of abandoning had in fact ceased to be such.†

4. PATTERSON v. RITCHIE. M. T. 1815. K. B. 4 M. & S. 393. BROTHERSTON v. BAXTER. M. T. 1816 K. B.; S. C. 5 Id. 418.

An abandonment offered to be made by the assured to the underwriter upon intelligence brought of the capture of the goods insured, which the underwriter refused to accept, the Court held not to entitle the assured to recover as for a total loss where, before action brought, the goods were recaptured and arrived at the place of destination, by which a partial loss only was sustained; for the assured can only recover an indemnity for such loss as he had sustained at the time of action brought.

5. MELLISH v. ANDREWS. H. T. 1812. K. B. 15 East, 13.

The assured of goods having received intelligence on the 8th of January, 1811, that the ship's papers were taken away on the 7th of December preceding, by the Swedish government, within whose port she was, did not give notice of abandonment to the defendant, the underwriter, till the 17th of January; the Court thought such notice was too late. Supposing an abandonment to be necessary, but, as the goods were finally seized and unladen by orders of the government on the 30th of April following, they were of opinion that the ineffectual notice of abandonment before given did not preclude the assured from recovering as for a total loss without any abandonment.

(c) *Legal effect of.*

1. BAINBRIDGE v. NEILSON. M. T. 1808. K. B. 10 East, 329. S. P. PARSONS v. SCOTT. E. T. 1810. C. P. 2 Taunt. 363.

A ship insured from Jamaica to Liverpool was captured in the course of her voyage, and recaptured in a few days; and the assured, having received intelligence of the capture, but not of the recapture, gave notice of abandonment; and soon after, receiving intelligence of the recapture, and that the ship was safe in the possession of the recaptors in a port in Ireland, but without any further knowledge of her state and condition, he persisted in his notice of abandonment: but the ship was afterwards restored to his possession, without damage, and arrived at Liverpool, and earned her freight, the salvage and charges of the recapture amounting only to 15*l.* 4*s.* 8*d.* per cent. It appearing in the result that at the time when the notice of abandonment was given, it was in fact only a partial, and not a total loss, as the assured supposed, and there being no subsequent circumstances, such as the loss of the voyage, high salvage, &c. to continue it a total loss.

Per Cur. A policy of insurance is only a contract of indemnity, and any thing which tends to show that an assured can recover beyond his indemnity is against the very principle of the contract; and here it would plainly lead to fraud if the plaintiff, who has in fact only sustained a partial loss to a small

* The assured, on receiving intelligence of such a loss as entitles him to abandon, must make his election to abandon, and give notice thereof to the underwriters within a reasonable time; else the loss on eventually proving partial, cannot be made total; see *Barber v. Blakes*, 9 East, 283; *S. P. Mullet v. Sheddon*, 13 East, 304.

† Insurance on a ship from Rio de Janeiro to Liverpool; and the ship was captured and afterwards recaptured; but in the interval the assured, having received intelligence of the capture, gave notice of abandonment; and after the recapture the ship arrived at Liverpool, having sustained a partial damage, and on action brought to recover a total loss; held, that the assured could only recover for a partial loss; see *Brotherston v. Barber*, 5 M. & S. 418.

extent, could recover beyond what would indemnify that loss. But it is said, that upon receiving intelligence he had a right to abandon immediately. We agree that it was prudent in him to give such notice at the time, and if things had stood in the same situation, he would have been entitled to abandon: but we consider that notice as including the implied condition, that things continued to exist as the plaintiff supposed they did exist at the time when he gave the notice; and if any thing happened afterwards to make that a partial, which at one time was a total, loss, the ignorance of that fact by the assured would not make it a total loss. The case of *M'Carthy v. Abel* shows that subsequent facts will vary the right of the party to abandon as for a total loss, when ultimately no loss is incurred within the policy. Suppose a capture, and the captors afterwards give up the ship, and she pursues her voyage as before, and the assured, receiving intelligence of the capture, but not of the release, to the re give notice to abandon; yet if the voyage be afterwards performed, would that entitle the assured to make it a total loss, when he had sustained no actual loss at all? Though the voyage might have been a little delayed, yet that would show that circumstances happening after a total loss once existing may take away the right to abandon. Then, if the fact be, that at the time of the notice to abandon given, it was not a total, but only a partial, loss, the giving such notice could not entitle him to abandon as for a total loss. By deciding that in all these cases the right of the party to abandon shall depend upon the actual circumstances of the case, and not upon those which are merely supposed to exist at the time, no injustice will be done; and it will make the policy that which it ought to be, and really is, a contract of indemnity.

2. *THOMPSON v. ROWCROFT* T. T. 1803. K. B. 4 East, 34. S. P. *LEATHAM v. TERRY* T. T. 1803. C. P. 3 B. & P. 479.

A shipowner, having chartered his ship to J. S., insured the ship and freight, with different sets of underwriters. Having notice of an embargo laid on the ship in a foreign port he abandoned the ship and freight to the respective underwriters, and received the whole amount of their subscriptions as for a total loss first undertaking, by a memorandum of the ship policy, to assign to the underwriters thereon his interest in the ship, and to account to them for it; and afterwards undertaking, by a similar memorandum on the freight policy to assign to the underwriters on freight, all right compensations, &c. The ship having been afterwards liberated, returned home, and earned freight, which was received by the assured. It was holden, that, however the question of priority as to the title to the freight might have been as between the different sets of underwriters litigating out of the same fund, and however the weight of argument might preponderate in favour of the underwriters on the ship; see 7 East, 30; yet that the assured who had received the freight was at all events liable on his express undertaking to pay it over to the underwriters on freight.

3. *M'CARTHY v. ABEL* T. T. 1804. K. B. 5 East, 388. 1 Smith, 524.

Upon a hostile embargo in a foreign port, the shipowner, who had separately insured ship and freight, abandoned them to the respective underwriters at the same time; the abandonment was accepted by the underwriters; afterwards the embargo was taken off, and the ship completed her voyage, and earned freight. The freight having been paid by the freighters to the underwriters on the ship, the shipowner, on freight, claiming as for a total loss, it was holden, that the assured could not recover, the freight having been in fact earned; or, supposing it to have been in any other sense lost to the assured, by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment, in consequence thereof, the underwriters on freight had not any concern.

4. *CORE v. DAVIDSON* M. T. 1820. Ex. 2 Price, 443; S. C. 2 B. & B. 379;

S. C. 5 Moore, 72. S. P. *THOMPSON v. ROWCROFT* T. T. 1803. K. B.

4 East, 47. *SHARP v. GLADSTONE* M. T. 1805. K. B. 7 East, 30.

From a special verdict the material facts found were, that heretofore, &c. not liable.

But it is now established, that an abandonment by the underwriters on the ship transfers to them as an incident the freight which the ship may subsequently earn, although a separate insurance may have been effected on the freight by the other underwriters.*

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certain persons were the owners of a ship called the *Fanny*; that the said ship, &c. afterwards was at Rio Janeiro, in parts beyond the sea, and was then a general seeking ship; that whilst at Rio Janeiro she was loaded with and took on board there a cargo of goods, being the property of divers and distinct persons, to be carried therein upon freight from Rio Janeiro to Liverpool; that the owners, according to the usage and custom of merchants, caused to be made and effected, and to be subscribed by divers underwriters, a certain writing or policy of assurance against the usual and customary perils and adventures on the said ship on a voyage &c.; and that the said Thomas then and there became and was an assurer, and subscribed the said policy of assurance for the sum of 203*l.*; that the said owners, afterwards, &c. according, &c. caused to be made and effected, and to be subscribed by divers other underwriters, divers other writings or policies of assurance against the usual and customary perils and adventures on the freight of the said ship on the same voyage; and that the persons who became and were assurers upon, and who subscribed the said policies on freight, were other and different persons from those who subscribed the said policy upon the said ship. It was also found that after the ship was so loaded she sailed with the said goods on board, and that afterwards and whilst she was proceeding on her voyage with the goods on board, she was captured by enemies of the King; and that afterwards, &c. the said owners gave several and respective timely notices of abandonment of the said ship or vessel, and also of the said freight, at the same time, to the said several assurers, who had subscribed the said several policies, as well upon the said ship or vessel as also upon the said freight, which said several and respective assurers then and there accepted the said notices; that the said ship or vessel, with the said goods on board thereof, afterwards, &c. was, by a ship of war of the King, recaptured and brought into London; and that a suit was thereupon instituted by the recaptors against the said ship and cargo, in the High Court of Admiralty; and by a decree of the said Court, the ship and goods were ordered to be and were restored to the respective owners, on payment of salvage to the recaptors, and of expences; and that the ship with the goods on board afterwards arrived at Liverpool, and there delivered her cargo to the respective owners thereof, and earned the freight payable in respect of the carriage and conveyance of the said goods. The verdict having found that it was agreed between the said owners and the said assurers on the said ship or vessel, but not by the said assurers on the freight, that the plaintiffs in error (defendants below) should sell the ship and receive the produce, and should also receive the freight of the cargo for the use and benefit of all persons who should be found to be entitled thereto respectively, then found that as well the assurers on the ship as the assurers on the freight had severally paid the owners for a total loss of 100*l.* per cent. on the said valuation on both the ship and the freight; and that the assurers on ship paid the total loss on the ship before the assurers on freight paid the loss on the freight; that the plaintiffs in error afterwards &c. sold the ship and received the money, and afterwards, &c. paid and divided the money produced by the sale of the ship to and amongst the assurers upon the ship, rateably and in proportion to their respective subscriptions to the said policy of insurance on the said ship; that the plaintiff in error afterwards, &c. received for the freight of the said goods certain sums of money, 35*l.* 16*s.* 6*d.* per cent. on the sum insured on the freight, and which they, the plaintiffs in error, held in their possession, upon the terms and for the purposes in the said agreement mentioned; that as well the assurers on the ship as the assurers on the freight, had respectively required the plaintiffs in error to pay to them respectively the amount of the said sum of money so received by them for the freight of the said goods as aforesaid, and that the said defendant in error having so subscribed the said policy of assurance on the said ship for the sum of 200*l.* as aforesaid, claimed to be

* If one of several jointly interested in a cargo effects an insurance for the benefit of all, he may give notice of abandonment for all; *Hunt v. Royal Exchange Assurance Company*, 5 M. & S. 47.

entitled to a proportion of the money, &c. as aforesaid, received by the said plaintiffs in error for freight.

Dallas, Chief Justice, now delivered the judgment of the Court. The case came before the Court on a writ of error from the King's Bench. It is unnecessary to state the facts in detail, as they will be found fully and accurately set forth in the report of what passed on the original argument in the court below. [481] It will be sufficient on the present occasion to observe, that there had been two separate insurances, the one on ship and the other on freight. The ship had been captured and recaptured in the course of the voyage, and had ultimately earned freight. There having been an abandonment of ship to the underwriters on ship, and of freight to the underwriters on freight, the question to be determined by us arose, whether, upon such abandonments, the abandonment of ship includes freight, and entitles the underwriters on ship to the freight also, wholly and exclusively under that abandonment, or, whether the underwriters on freight are entitled to the freight, as having insured the freight specifically, and having from the assured an abandonment of such freight under the insurance so made. This question has been long depending, but always avoided, because in former cases not necessary to be decided, it has at last been determined by the Court, from whose judgment error is now brought, in which three of the learned judges held, that an abandonment of ship included freight; and a different opinion was delivered by Mr. Justice Bailey, who considered that an abandonment of freight gave the abandonnee a right to such freight as a subject-matter of insurance, separate and distinct from that of the ship, with reference to contracts on policies of insurance. It would be an idle parade and a waste of time to go into the subject at large, fully treated of as it is in all the elementary works on insurance law, and more particularly as the printed report to which we have already alluded contains all, in point of authority and observation, that can properly belong to the question. We shall, therefore, merely advert to the general grounds on which the argument has proceeded, and on which the decision must now depend. 1st. It is not denied that generally speaking, an assignment of ship includes freight; but it is said that it does so, because such is the natural effect and consequence of such assignment, where there is no agreement between the parties to the contrary; whereas, in cases of abandonment under insurance, such agreement is to be implied from the practice of making separate insurances, which the law of this country, differing in this respect from the law of other countries, permits; and that the law therefore keeps the interest of the parties separate and distinct, giving to the underwriters on ship the ship abandoned, and the freight to the underwriters on freight abandoned. That such a practice has prevailed is undoubtedly true; but there is a fallacy in confounding the fact of that practice with the legal effect of a contract for insurance. It is the practice itself that raises the legal question. To make the practice decisive of the law, it would be necessary to go further and to show a practice of settling losses in conformity to it, and that the underwriters on ship have never claimed the freight, and the underwriters on freight have constantly received it. Such a practice, if of sufficient prevalence and notoriety to raise the presumption of general knowledge, which shows the understanding of parties with reference to which they must be taken to deal, would therefore form the basis of the contract between those who were respectively privy to it. But it was admitted in the argument in the court below, and adverted to upon the bench, and has again been admitted in the argument here, that there has been no such settled practice; but that, on the contrary, the question has altogether hitherto been the subject of controversy, the underwriters on ship having, in every instance, resisted the claim of the underwriters on freight, asserting, that the freight belonged to themselves as owners of the ship, on the abandonment being made. It is not pretended that there has been any actual agreement to the contrary in this case, and it seems to follow, of course, that no such agreement can be implied from the mere practice of insuring separately, when we find that the practice stops with the fact of so insuring, and the effect of such fact has constantly

[482] been matter of dispute. We have dwelt on this the more, because we observe that in the court below, the argument was mainly pressed on the ground that such an agreement was to be implied, which we think it cannot be for the reasons which we have given. It then becomes our business to inquire, there being then no actual or implied agreement between the two sets of insurers, what in point of law is the effect of the contract into which they have respectively entered with the owners. We say the two sets of insurers, because it is not necessary to consider the consequence of a separate insurance and abandonment of freight between the insurers on freight and the assured, under all circumstances that might possibly arise on the contract directly made between them. Confining therefore, the consideration in the manner stated, what is the legal operation of the respective contracts? In resolving this question, we put no stress upon the fact, that freight passes under a general assignment of ship, because that appears to us to be begging the question; the question [arising on a supposed distinction, existing in cases of abandonment, as being different from common transfer by the ordinary modes. The effect of it correctly considered is only to remit the question to the general operation of law, supposing the distinction contended for to fail. Nor do we place reliance on the assignee of the ship becoming the owner of her, in a common case; for there again the question turns upon the asserted distinction; neither do we give weight to the mere fact of separate insurance, for this also would be to take that point for granted; and they are not separate but connected, if made under a general understanding that each shall refer to and be regulated by the other. But the case seems to us to result to this: if, in every other case of transfer, the freight follows the assignment of the ship; and if abandonment be but a different term for assignment, and the same in effect, unless modified to a different purpose by the agreement of parties; and if in this case, so far from there being any such agreement, either actual or to be presumed in law, the contrary is to be implied, the case only amounting to claim on one side, and resistance to such claim on the other, the reason fails for taking this case out of the general law; and, consequently, the underwriters on ship are entitled to freight. In so deciding, we shall not break in upon the general legal principle, by engrafting upon it an anomaly of doubtful convenience, nor will the decision lead to any difficulty in future, as ship and freight may be made the subject of one and the same insurance; or, if there be any practicable objection to this, of which we are not aware, the parties may contract with reference to the law as now finally settled, supposing the case to end here. We will merely further state, that we have avoided going into much that has on former occasions been closely or loosely applied to the subject, having confined ourselves, for the reasons given, and which we will not repeat, to a single and general view of it. The consequence of our opinion is, that the judgment of the Court of King's Bench must be affirmed.—Judgment affirmed.

(X) RELATIVE TO SALVAGE. See *post*, tit. Salvage.

Salvage is the compensation that is to be made to other persons, by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss. This compensation is known by the name of salvage, and at present is commonly made by a payment in money; but, in the infancy of commerce, was more frequently made by the delivery of some portion of the specific articles saved or recovered. All foreign codes of maritime law, both ancient and modern, contain provisions and enactments on this head. In some of them the value to be paid is fixed at a certain portion of the articles saved, or of their value, according to their nature and quality, in the circumstances of the case. But it is obvious that positive and settled rules are little [483] adapted to the administration of justice, in varying and unsettled cases; and what can be more various and unsettled, than the degrees of labour experienced on the ocean, or the degrees of peril to which persons, who engage in the meritorious task of assisting the distressed on that element, are at different times exposed? And therefore, in the case of wreck or derelict at sea,

the law of England, like the law of some other countries, has fixed no positive rule or rate of salvage, but directs only, as a general principle, that a reasonable compensation shall be made. The legislators of all civilized and commercial states, in modern times, have laboured earnestly to express, by due severity of punishment, the barbarous spirit of plundering the helpless and distressed mariner, whose situation calls for assistance and relief; and very salutary provisions have been made on this subject by the wisdom of our own parliament. A person, who, by his own labour preserves goods which the owner, or those entrusted with the care of them, have either abandoned in distress at sea, or are unable to protect and secure, is entitled by the common law of England to retain the possession of the goods saved, until a proper compensation is made to him for his trouble. This compensation, if the parties cannot agree upon it, may by the same law be ascertained by a jury, in an action brought by the salvor against the proprietor of the goods; or the proprietor may tender to the salvor such sum of money as he thinks sufficient, and, upon refusal to deliver the goods, bring an action against the salvor; and if the jury think the sum tendered sufficient, he will recover his goods, or their value, and the costs of his suit. But a person, even though he may be the lord of the manor, cannot entitle himself to a claim of salvage, by taking possession of a wreck or parts thereof, against the consent of those who are at hand and upon the spot, employed by the owner of the ship to save and preserve them. And if one set of persons have taken possession of a vessel abandoned at sea, and are endeavouring to bring it into port and save it, another set have no right to interfere with them, and become participators in the salvage, unless it appears that the first would not have been able to effect the purpose without the aid of the others. Nor, if a vessel be preserved, the cargo of which consists of government stores, is the dispossession of the original salvors, by the officers of a king's ship, warranted by law, without reasonable cause for their interference. Should, however, persons be found in possession who, from want of experience, may be unfit to be trusted with valuable property, or who have been guilty of gross misconduct, which may render their removal proper and necessary, the interference of the king's officers may in such cases be not only justifiable, but even laudable. If the salvage is performed at sea, or between high and low water mark, the Court of Admiralty has jurisdiction over the subject, and will fix the sum to be paid, and adjust the proportions, and take care of the property pending the suit; or, if a sale is necessary, direct a sale to be made, and divide the proceeds between the salvors and the proprietors, according to equity and reason.

(Y) RELATIVE TO ALTERATIONS THAT VITIATE THE POLICY.

1. *MASTERS V. MILLER*. T. T. 1791. K. B. 4 T. R. 320; S. C. 2 H. Bl. 141.

Per Cur. A material alteration made without consent invalidates the instrument both in law and equity, and renders it incapable of being enforced, either according to its original or altered state.

See 15 East, 31, 32; 4 B. & A. 672; 3 Stark. 60.

2. *LANGHORN V. COLOGON*. E. T. 1812. C. P. 4 Taunt. 330.

Action upon a policy of insurance, which was subscribed by the defendant in the usual printed form, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boats, and other furniture of and in the good ship ———, at and from London to any port or ports in the Baltic. No words in writing, descriptive of the specific subject of insurance, having at that time been inserted in the policy, no value was declared. After the subscription by the defendant, the plaintiff inserted in the policy, in the blank which occurs after the printed words "shall be valued at," (striking out the words,) "100 hogsheads of fine sugar, 60 hogsheads of molasses, and 20 tuns of fustic." The policy was afterwards signed by several of the underwriters, with the initial letters of their names set against these words, to indicate their approbation of the insertion, and their consent that the assurance should be on those articles; but the defendant had not subscribed

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A material alteration made without consent invalidates the instrument both in law and equity, and renders it incapable of being enforced, either according to its original or altered state.

Hence, if a policy be executed in the common form on goods, without specifying the kind, and the insured afterwards insert a de

scription of his initials, nor was it proved that he had given any verbal assent to this addition. There were several counts in the declaration, laying the insurance in different ways. The second count stated that, with the consent of the underwriters, the insurance was afterwards declared to be on the goods specified. Upon the trial of this cause at Guildhall, at the sittings after Michaelmas Term, 1811, before Mansfield, C. J., it was objected, upon this instrument, that the original policy was discharged by the alteration, and that the defendant had never subscribed or assented to the altered policy. It was also urged, that this was such an alteration in the subject-matter of the insurance as required a new stamp as a new contract, and was not cured by the statute 35 Geo. 3, c. 63, s. 13. Mansfield, C. J., nonsuited the plaintiff, reserving to him liberty to move to enter a verdict.

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Per Cur. In this case, as to the main point, we cannot get rid of the impression, that the instrument now is different from what it is stated in the only count on which the plaintiff could have recovered at the trial. The alteration is a very material one. When once a declaration of interest is made, the policy attaches not on any goods the plaintiff might put on board, but on those comprehended in that declaration. The instrument, therefore, as to those who do not assent to that declaration is gone. As to a return of premium, suppose the assured tears the seals off his policy, can he, by his own act, compel the assured to return the premium? The underwriter has fulfilled all his part. The assured can no more compel the underwriter to return the premium than the underwriter can compel him to relinquish the contract. As to the case to which this is compared, of effecting an insurance and not putting any goods on board, it is understood to be the implied terms of the contract of insurance, that if the goods are not put on board, the money shall be returned. Here the law avoids the contract by an accident unforeseen and unintended, but the premium cannot be returned; and it rests with the conscience of the defendant, whether he will pay this money or not. The law upon the subject is plain.

So, an alteration in the vessel's place of destination cannot be made without the insurer's consent.

3. CAMPBELL v. CHRISTIE, H. T. 1817. N. P. 2 Stark. 64. S. P. LAIRD v. ROBERTSON. 4 Bro. P. C. 488.

A policy of insurance from Calmer to Portsmouth, was altered with the consent of some of the underwriters, by inserting the words "or Weymouth" after Portsmouth. The Court held that the plaintiff could recover on the altered policy against an underwriter who was ignorant of the alteration when it was made, even although, upon being informed of the alteration, he said that he would not take advantage of it.

And the same rule holds as to a liberty to call at a port, not in the course of the voyage as originally described;

4. FORSHAW v. CHABERT. M. T. 1821. C. P. 3 B. & B. 558.

Policy of insurance on ship and goods at and from Cuba to Liverpool, with liberty in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever, and with leave to discharge and take in, at any ports or places she might touch at, without prejudice to that insurance. The insured, after subscription of the policy, inserted in the body of it the words "with leave to call off Jamaica," to which interpolation all the underwriters assented, without increase of premium, except the defendant, who, being out of the way, was not applied to. The captain sailed from Cuba, with eight men engaged to navigate to Liverpool, and two to Jamaica, being unable, at Cuba, to procure ten men (the proper complement of the crew) for Liverpool. He then touched at Jamaica for the sole purpose of landing the two men, and procuring others in their stead; and having accomplished his purpose, was lost on the voyage from Jamaica to Liverpool. The Court held, that this was a material alteration of the policy, and rendered it void.

But an alteration by one of the parties, without the consent of

5. CLAPHAM v. COLOGON. E. T. 1813. N. P. 3 Campb. 382. S. P. SAUND-ERSON v. SYMONDS. M. T. 1819. C. P. 1 B. & B. 426. Re-argued, 3 id. 158.

The policy was originally filled up "on the Three Sisters, at and from Ca-

* So, if the insured, after the policy has been signed, strike out a warranty to sail at a certain time, and insert a memorandum of an enlarged time in the margin see *Fairlie v. Christie*, 7 Taunt. 416; *S. C.* 1 Moore, 114; *Holt*, 331 at N. P. *contra*.

diz and Seville to Liverpool." After it had been signed by the underwriters, the broker inserted the words "Tres Hermanas, or," and "both or either." Several of the underwriters put their initials to the alteration; but the defendant refused to do so. When the broker effected the policy, he merely called the ship "The Three Sisters," without making any representation as to the country she belonged to. In point of fact she was originally a Dane, and was purchased by the bankrupt, a merchant at Liverpool. While at Seville, on the adventure in question, he changed her name to the Tres Hermanas, manned her with a Spanish crew, commanded by a Spanish captain, and put her under the Spanish flag. She was lost on the voyage home by the perils of the sea.

Lord Ellenborough said, the mere calling the ship by an English name, could not amount to a warranty or representation that she was English; she might have been an American, or an English prize, preserving her original name; or a ship built on the continent, whose name was translated into English. No harm, therefore, could be done by inserting the Tres Hermanas in the policy, that being a mere translation of the Three Sisters. So the other alteration could not vitiate the policy, being in an immaterial part. Without the words "both or either" the ship had had the option of going both to Cadiz and Seville, or not, as it might suit the exigences of the adventure; so that if she went to both, she took them in their proper order; and with the insertion she still would have enjoyed the liberty under the same limitation. The legal operation of the instrument, therefore, is in no degree affected.

6. *BATES v. GIBBORNE*. H. T. 1703. K. B. 2 Salk. 444; S. C. Holt, 469.

In case on a policy of insurance, upon *non assumpsit* pleaded. The case was: Mr. Crisp, being at the West Indies, sent a letter to Bates to insure the goods in the Mary Galley, of St. Christopher, Captain A. Hill, commander, at London; Bates carried the letter to Stubbs, who wrote policies, and by mistake, made the assurance on the Mary, Captain Haslewood, commander, &c. This policy, thus made, was subscribed by the defendant. The Mary Galley was lost, and then Stubbs applied to the insurers to consent to alter the policy, to which they agreed, and the mistake was mended. It was objected at the trial that the Mary was a stouter ship than the Mary Galley, and that the insurers ought to have an increase of premium for the alteration. But it was held by Holt, C. J., that the action well lay, and that the mistake might be set right, and that Stubbs was a good witness and he cited this case, which happened when Pemberton was Chief Justice: an insurance was made from Archangel to the Downs, and from the Downs to Leghorn; but there was a parol agreement at the same time, till the ship came to such a place; and it was held the parol agreement should avoid the writing.

7. *ROBINSON v. TOBIN*. T. T. 1816. N. P. 1 Stark, 336.

A policy is effected on the plaintiff's share of goods, valued at 500*l*.; but upon its turning out that the plaintiff's interest was larger, the words were added in the margin of the policy, "on the plaintiff's share of the goods, say one-fifth, valued at 1,000*l*," to which the defendant's initials were subscribed. Lord Ellenborough was of opinion, that at the time of the alteration all was in *feri*, and that the whole constituted but one agreement.—Verdict for the plaintiff.

8. *SOWTELL v. LOUDON*. H. T. 1814. C. P. 5 Taunt. 359; S. C. 1 Marsh, 99.

Action on a policy of insurance, which was effected the 3rd of December, 1812, on the ship Sophia, at and from Bristol to Port Mahon, with leave to call at Gibraltar, and take in and discharge goods there, and with liberty to seek, join and exchange convoy in the English and Irish Channels, with or without letters of marque. The words "on ship" were afterwards struck through with a pen, and the following memorandum was inserted on the margin of the policy, signed with the initials of the underwriters: "The interest insured by this policy is declared to be on goods, as interest may appear, including all charges incident to a loss, and to pay average on each package,

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the other,
does not vi-
tiate the po-
licy, if it
occur in an
immaterial
part, and
do not vary
the legal ef-
fect of the
instrument;

Or by the
consent of
both par-
ties;

[487]

Or where,
at the time
of making
the altera-
tion, all is
in *feri*
or to be
done.

Where a
broker, in-
structed to
effect a po-
licy on
goods, ef-
fected it on
a ship, and
the mistake
was recti-
fied with the
consent of
the under-

writers by a memorandum in the margin, it was held that no step was necessary to render the contract effectual.

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as if separately insured. London, 7th December, 1812." The plaintiff was charterer of the ship. The ship had sailed from Bristol on the 19th of November, with a cargo, to join convoy at Falmouth; but owing to bad weather was not able to make the latter port, and before she arrived at Gibraltar had sustained the damage which occasioned the average loss sought to be recovered in this action, on the ground of the concealment of a material letter from the underwriters. This letter, which was dated the 6th of December, 1812, was written by the plaintiff to the broker who effected the policy, in answer to some inquiries made by the latter respecting the ship, it appearing by Loyd's books that a ship called the *Sophia*, of Bristol, had been seen at sea without convoy. The letter was to the following effect: "The *Sophia* you allude to is the vessel on which you effected the insurance, which ought to have been on goods; be so good as to get this rectified. I chartered the brig (meaning the *Sophia*), and she was to have gone to Falmouth, as I understand, to join convoy, but I suppose the wind was contrary, and she could not fetch the port; but I know nothing about it myself." The counsel showed cause against the rule, upon the objection, viz. that the letter above recited contained information which ought to have been communicated to the underwriters; and contended that the vessel having been insured, "with or without letters of marque," the plaintiff had a right to consider her as a running ship, and that, therefore, it was not necessary that she should sail with convoy; but independantly of that, the letter only stated that she had been seen at sea, not in distress or danger; she was, therefore, so far advanced on her voyage, and the risk, consequently, rather diminished than increased; the conclusion of the letter, they said, proved that even this was only conjecture. The question, therefore, was, whether the insured was bound to communicate every suspicion and surmise which arose in his own mind? It was denied that the ship had a right to sail without convoy, and contended, therefore, that her having been seen at sea without convoy was a material fact. It had been observed by Lord Mansfield, that in these cases *uberrima fides* should prevail; but in this case there appeared to have existed no faith at all. The Court being unanimously of opinion that this was a material fact, and ought to have been communicated, the rule was made absolute for a new trial. See 12 East, 471; 8 East, 373.

9. ROBINSON v. TOWRAY. M. T. 1811. N. P. 3 Campb. 158; S. C. 1 M. & S. 218. n.

So, if a broker, by mistake, misdescribed the ship on which the goods are aboard, he may after wards, without the assent of the underwriters, and with out a new stamp, declare the interest to be on goods by another ship.*

Action on a policy of insurance. On the 16th of October the brokers called on the underwriters to subscribe the following declaration: "The interest attached to this policy is hereby declared to be shipped on board the *Tweende Venner* and the *Neptunus*." The defendant and the other underwriters put their initials to this declaration. However, it was a mere mistake on the part of the brokers; Brandt, Rodde, and Co. having no goods on board either of these ships, and having given no orders to declare upon them. On the 7th of November the brokers, being directed to declare upon the *America*, called upon the underwriters to subscribe a declaration to that effect.

Lord Ellenborough. I am of opinion that that declaration of interest does not require any assent on the part of the underwriters. They put their initials to it, not for the purpose of expressing their assent, but to authenticate the declaration, and to prevent fraud in changing the subject-matter intended to be covered by the insurance. The contract between the parties is complete when the underwriters have signed the policy; the declaration of interest is the mere exercise of a power conferred upon the assured. It is generally put upon the policy for convenience; but this is not necessary, nor is there any necessity for its being in writing. There was here a blunder in the names of the ships first declared; if this was without fraud and without prejudice to the underwriters, I think it might be corrected without the assent of the defendant, and without a fresh stamp.

* Mistakes in policies may be rectified by application to a court of Equity 1 Atk. 545; even after loss; 1 Ves. §17: 6 id. 333; 2 Atk. 359.

(Z) RELATIVE TO THE PREMIUMS.

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(a) Of the party liable for.

1. *SHEE V. CLARKSON*. T. T. 1810. K. B. 12 East, 507. S. P. DE GA-MENDE V. PIGOU. H. T. 1812. C. P. 4 Taunt. 246.

The plaintiff, in 1808, had subscribed policies of insurance, which the defendants had effected as brokers, the premiums upon which amounted to 559*l.* 10*s.*, and had also settled and signed, upon policies subscribed by him for them, adjustments for returns of premiums amounting to 18*l.* leaving a balance due to the plaintiff of 541*l.* 10*s.*, for which this action was brought. The defendants insist that they are entitled to deduct or retain out of that sum, the sum 205*l.* 19*s.* 6*d.* being the amount of deductions for short interests and stipulated returns of premiums for convoy upon the same policies for the premiums on which this action was brought, and which policies had always remained in the defendants' hands, and had not been handed over to their principals. There was no evidence that the defendants had received the premiums from their principals, nor had they credited their principals with returns of premium for convoy and short interest claimed by them. The plaintiff had allowed the defendants in accounts all the returns on policies upon ships and goods in which they were personally interested, and also all the returns on policies which have been adjusted: and the set-off or deduction claimed of 200*l.* 19*s.* 6*d.* in dispute arises upon policies subscribed by the plaintiff, which the defendants have effected as brokers for others. The defendants did not act under any *del credere* agency or commission. The events entitling to the returns claimed had happened before the commencement of the present action; but it was not admitted by the plaintiff that the defendants were thereby entitled to deduct or set off the returns claimed; that being the question for the opinion of the Court. The plaintiff insisted that, upon the events happening, the principals, and not the brokers, were entitled to the returns claimed, unless such returns were adjusted by the underwriters with the brokers; and the defendants insisted that, upon the events happening without any adjustment, or *del credere* commission, they as brokers were entitled to the returns as abatements out of premiums. The question was, whether the defendants were entitled to deduct or set off the sum of 205*l.* 19*s.* 6*d.*? If not, the verdict was to stand for that amount; if they were so entitled, a verdict was to be entered for the defendants.

Lord Ellenborough, C. J. That makes all the difference. The whole premiums sued for might have been stopped by the underwriter in the hands of the broker; and while the events on which the returns of premiums depended were yet undecided, his agency on the part of the underwriters might have been determined, and he might have been ordered to pay over the money. But the broker is the common agent of both the assured and the underwriter; and the underwriter knows that the broker is the trustee for the assured as long as the policy remains in his hands, to adjust and receive returns of premium for him when the events have happened on which they are to be made. Here then the brokers, having notice that the events had happened which entitled the assured to such returns, before they had paid over the entire premiums to the underwriters, were entitled to deduct so much from the gross amount of those premiums.

2. *FRY V. BELL*. E. T. 1811. C. P. 3 Taunt. 493.

The plaintiff, who resided at Pillau, procured A. Gordon, who was a young man just embarking in business, to effect the several policies in question upon an assurance that he would address the ships to him, and permit him to receive the freight and reimburse himself thereout to the amount of the premiums; upon a communication of this proposal to the underwriters, they gave Gordon credit for the premiums. The plaintiff also remitted to Gordon, whom he had drawn into other transactions with him, bills on Thornton and Bayley, which the latter refused to accept, alleging that they waited for some explanation from the plaintiff, but that all would be right, and in the meantime offered to accommodate the plaintiff by accepting his own bills for the like amount

Yet this tacit agreement supposes that all is fair on the side of the assured and the transaction be in the common course of

business; for if there has been any fraud or malpractice, the underwriters may require him to pay the premium.

upon the security of these policies, which Gordon accordingly deposited in their hands; the plaintiff, instead of consigning his ships to Gordon, as he had promised, consigned them to Thornton and Bayley, and assigned the freight to them, so that Gordon was left destitute, as well of the means of receiving the loss on the *Vigilant* and returns of premium, as of the expected funds to arise from the freight for the payments of the premiums to the underwriters. The defendant, therefore, claimed to set off the premiums which he had never received against the loss and returns to which he was liable. The jury thinking that when the underwriters sign a policy, and thereby acknowledge the receipt of the premium, the account is finally closed between the assured and the underwriters, found a verdict for the plaintiff. The Court were all of opinion that there ought to be a new trial. The jury were strongly impressed in this case, as they were in the case of *Mavor v. Simeon*, with the general doctrine, that the transaction is closed when the underwriter writes his receipt; and that he cannot say the premium has not been paid. But the plaintiff knew, as appeared by his own letters, that Gordon was perfectly unable to pay these premiums. The plaintiff had prevailed on him to effectuate these policies, in effecting which, he knew that Gordon, according to the common course of business, had got receipts for this immense sum, and he knew that the defendant must give these receipts. The plaintiff knew that Gordon had no fund out of which that money could have been paid. He knew that, according to the common course of business though receipts were to be given by the underwriters, who subscribed the policies, yet, in fact, no money had ever passed between the underwriters and the broker; he knew he had promised the broker to put in his hands the proceeds of the cargo of the *Vigilant*, and that he should also receive the freights of the other three ships: and then, with regard to the freights, he had given the freights of these three ships to Thornton and Bailey; they became the assignees of the ships, and received the freights; and, therefore, the plaintiff knew that the broker never paid the premium. Knowing, then, that Gordon received the receipts, and that he never would pay the premium, he brings actions in this court to recover back premiums which he knew never were paid. So that this is a monstrous proposition on the part of the plaintiff, who says by this action against the underwriters, return me that premium which you never received, but which you ought to have received, and which you would have received if I had not cheated the broker, by promising him this fund out of which he was to pay the premium, and then diverting it into another channel. It is impossible that that can be supported, and therefore there must be a new trial.

3. *MORIS V. SIMEON*. E. T. 1810. C. P. 3 Taunt 497.

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Or where the assured procures the assurance to cover a debt from the broker to himself, setting the premium against the debt.

The plaintiff declared, that in consideration that he had, before that time, as an insurer, underwritten certain policies of assurance as to certain sums therein subscribed against his name, on the ships and merchandises in those policies specified, without receiving the premiums therein mentioned, the defendant undertook to pay him so much as the premiums amounted to upon request. There were also a count for interest, and the usual money counts. It appeared, that the defendant having long employed Haynes, a broker, to effect insurances for him, and the broker being considerably indebted to him on the balance of accounts, and the defendant much suspecting his circumstances, it was agreed between them, in order to keep the broker from bankruptcy, and to liquidate his debt due to the defendant, that Haynes should continue to effect insurances for the defendant as usual, and should debit him with the premiums, but should lodge all the policies in the defendant's hands, and permit him to receive the losses and returns of premium. The broker accordingly effected policies with the various persons, the premiums on which amounted to 12,000*l.*, and, amongst others, with the plaintiff, none of whom ever received the premiums, but credited the broker with the amount. The broker lodged the policies in the hands of the defendant, who never paid the broker the premiums. This course of dealing continued until the premiums for which Haynes credited the defendants exceeded the balance due to him by

2004. The defendant then ceased to employ Haynes to effect any more policies. It was contended for the defendant, that the plaintiff having acknowledged on the face of the policies the payment of the premium, was estopped for claiming them against the underwriter. If he chose to give credit to the broker, that was at his own risk; but to the broker alone could he resort for payment, if he did not insist upon receiving it at the time of executing the policy. If this were not so, there would be an end to the whole system of underwriting. The special jury, unwilling to subvert so important a branch of trade, found a verdict for the defendant. On a rule nisi, for setting aside the verdict, counsel, on showing cause as to the special contract, stated, as to the first count, there was no evidence whatever of any such contract being made in fact, and it was not a contract which could arise by implication of law; for the contract which the law would imply must be according to the usage of the trade, and the usage of the trade was directly in opposition to any such practice. Haynes was employed to effect insurances after the arrangement between him and the defendant precisely in the same way as before. There was no alteration in the manner of doing business; no communication on the subject was made by Haynes to the underwriters; if, therefore, the balance of premiums upon the statement of accounts between Haynes and the defendant had been in favour of Haynes, his assignees (he having been a bankrupt) would have had a right to recover part of that balance of premiums from them. The defendant did not create these voyages and cargoes for the purpose of getting money from the underwriters; he was proceeding in his ordinary course of his merchandize, and caused Haynes to proceed in the same way, making only this alteration, that he required permission to receive the losses himself, which he had a right to do; *Daltzell v. Mair*, Camph. 532. was precisely similar. This is not the case (to which the opposite counsel compared it) of a man who, suspecting his creditor, makes a large purchase of him, as in *Markin v. Pewtress*, 4 Burr. 2476. with intention to set off the prices. All the cases prove this principle, that the contract of assurance is a contract between the assured and the broker, not between the assured and the underwriter; and the bargain is such, that, in the language of Buller, J., in *Grove v. Dubois*, 1 T. R. 125. it makes no difference whether, at the time of making the policy, the underwriter knew the principal or not; he trusted to the broker, and credit was given to him, not to the other.

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Lawrence, J. That case turned out in effect of a *del credere* commission. You say there is a distinct contract between the broker and the underwriter; but if the assured be not a party, how could he sue on the loss? The argument requires that at least this should be a tripartite contract; for the underwriter engages to pay a loss and to return the premiums.

(b) Return of.

1. *STEVENS v. SNOW*. M. T. 1761. K. B. 3 Burr. 1739; S. C. 1 Bl. Rep. 315. S. P. *TYRIS v. FLETCHER*. M. T. 1777. K. B. Cowp. 668. Doug. 588.

Special case reserved, upon an action for money had and received to the plaintiff's use, brought by the plaintiff, the insured, against the defendant, the insurer, for a return of part of the premium. It was an insurance upon a ship at five guineas per cent., lost or not lost, at and from London to Halifax, in there shall Nova Scotia, warranted to depart with convoy from Portsmouth for the voyage, that is to say, the Halifax or Louisburgh convoy. Before the ship arrived at Portsmouth the convoy was gone. Notice of this was immediately given by the insured to the underwriter, and at the same time he was also desired either to make the long insurance, or to return part of the premium.—The jury find that the usual premium from London to Portsmouth is one-and-a-half per cent. They also find it is usual for the underwriter in such like cases to return part of the premium, but the quantum is uncertain (and the quantum must in its nature be uncertain, because it depends upon uncertain circumstances). It is stated that the plaintiff made an offer to the defendant of allowing him to retain one-and-a-half per cent. for the risk he had run on

In all cases where the risk never has begun there shall be a return of premium.

such part of the voyage as was performed under the policy, viz. from London to Portsmouth.

[493] Lord Mansfield. I had not at the trial, nor have now the least doubt upon this question myself. These contracts are to be taken with great latitude; the strict letter of the contract is not to be so much regarded as the object and intention of it. Equity implies a condition that the insurer shall not receive the price of running a risk if he run none. This is a contract without any consideration as to the voyage from Portsmouth to Halifax; for he intended to insure that part of the voyage, as well as the former part of it, and has not. Consequently, the insured received no consideration for this proportion of his premium; and then this case is within the general principle of action for money had and received to the plaintiff's use. I do not go upon the usage; for the usage found is only that in like cases it is usual to return a part of the premium; without ascertaining what part. If the risk is not run, though it is by the neglect, or even the fault of the party insuring, yet the insurer shall not retain the premium. It has been objected, that the voyage being begun, and part of the risk being already run, the premium cannot be apportioned. But I can see no force in this objection. This is not a contract so entire that there can be no apportionment; for there are two parts in this contract; and the premium may be divided into two distinct parts, relative, as it were, to two distinct voyages. The practice shows that it has been usual in such like cases to return a part of the premium, though the quantum be not ascertained; and indeed the quantum must vary as circumstances vary, so that it never can have been fixed with any precise exactness. But, though the quantum has not been ascertained, yet the principle is agreeable to the general sense of mankind.

Mr. Justice Dennison. It is most equitable that the defendant should only retain the premium for such part of the voyage as he has run any risk; the insured has a right to have the other part restored to him. This is agreeable to the general principle of actions for money had and received to the use of the plaintiff; where the defendant has no right to retain, he must refund it.

Mr. Justice Foster. There is no consideration for the remainder of the premium; for in the voyage from Portsmouth to Halifax no risk was run by the insurer, who only insured the voyage with convoy; therefore he has no right to retain the premium for this.

2. *FEISE v. PORKMAN*. M. T. 1812. C. P. 4 Taunt. 640.

Misrepresentation without fraud, vacating a policy entitles the assured to a return of premium.*
[494] Action upon a policy. The plaintiff proved the subscription loss and interest; and the defendant rested his case upon a misrepresentation made to the first underwriter at the time of effecting the policy, to whom, as it was sworn by the broker, the plaintiff had stated that the ship had both an English licence and a French imperial licence; whereas the fact was, that the ship had an English licence and a French pass from Cuxhaven, which enabled her to come down the Elbe from Hamburg, and also enabled her to put to sea without molestation at Cuxhaven, but by no means operated as a licence to her trade with England; and it was sworn that the circumstance of having a French imperial licence made a considerable difference in the amount of the premium of insuring such a voyage at the time when the policy was effected. The jury found a verdict for the defendant.

Gibbs, J. Where there is fraud there is no return of premium; but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium. This business is conducted on the part of the assured with the utmost imprudence; these transactions are done by parol between the plaintiff and defendant, the broker only present; and on which side his interest leans, if he be dishonest, all know; as long as it is the law we must admit it; but this is one among other proofs of the mischievous tendency of admitting parol evidence of what passes at the time of making written instruments to control them. It is clear that the plaintiff is not entitled to a new trial on the first ground; I think it is equally clear that the plaintiff is enti-

* When the assured fails from an exception in the policy, express or implied, there can be no return of premium; see *Gladstone v. King*, 1 M. & S. 35.

that to enter his verdict on the count for money [had and received for the premium; but as the return of the premium was not claimed at the trial, that cannot be done without the defendant's consent; upon the other counts the verdict must be for the defendant; if the defendant will not consent, the Court must grant a new trial generally.

3 *PENSON V. LEE*. M. T. 1800. C. P. 2 B. & P. 330.

In *assumpsit* on a policy of insurance, with a count for money had and received; the defendant had not paid any money into court. The defence was, that the ship was not seaworthy; on which point, without any direct evidence of fraud, the case was submitted to the jury.—General verdict for defendant. It was not intimated to the jury that the plaintiff was entitled to a verdict for a return of premium. On an application to the Court, it was holden that the plaintiff was entitled to a verdict for the premium on the count for money had and received; but the Court hoped that in future the counsel would in his opening demand the premium in every case where it was intended to insist upon it on failure of his claim for the loss.

4. *ROTHWELL V. COOKE*. M. T. 1727. C. P. 1 B. & P. 172. S. P. STEVENSON V. SNOW. M. T. 1761. K. B. 3 Burr. 1237; S. C. 1 Bl. Rep. 315.

The policy was on a ship "at and from Hull to Bilbao, warranted to depart from England with convoy." The ship sailed from Hull to Portsmouth, and thence departed with convoy, which not being direct for Bilbao, she afterwards left and was captured; the warranty not having been complied with, the plaintiff would have been nonsuited; but it was insisted that he was entitled to a verdict for the premium, which was found accordingly. On motion to set aside this verdict,

Eyre, C. J., said: The verdict now stands for the return of the whole premium, and the question is, whether it should stand for the whole, for none, or for a part? If for a part, I do not know how it is to be settled; it must depend on there being or not being some rule to be found to direct us in making the decision. Certain it is, that if the ship had been lost in coming round to Portsmouth, the underwriters would have been liable; it is not, therefore, reasonable that they should have been so liable without retaining a proportion of the premium. You should inquire whether there is any rate of premium among the underwriters from Hull to Portsmouth, and whether the premium has ever been apportioned where there has been only one insurance, without distinguishing the different risks in the policy. If you can find any rule, I recommend you to adopt it; but if you cannot agree, I think the whole premium ought not to be returned; and, therefore, the present verdict must be set aside, and the case go to a new trial.—Rule absolute.

5. *LORMER V. THOMLINES*. H. T. 1781. K. B. Doug. 585.

The plaintiff declared that the defendant, in consideration that the plaintiff at his request had underwritten several policies of insurance as to certain sums of money therein subscribed against his name on the ships, merchandizes, and other things therein respectively specified, without receiving the full premiums therein mentioned, undertook and promised to pay the plaintiff so much money as the premiums therein mentioned to be paid to him amounted to, with an averment that they amounted to 40*l*. There was another count for 40*l*. for money had and received by the defendant to the plaintiff's use. The defendant pleaded *non assumpsit* as to all except the sum of 3*l*., upon which plea issue was joined; and as to the 3*l*. he pleaded a tender, and paid that sum into the court. Upon the plea of tender issue was also joined. The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other issue for the sum of 15*l*., subject to the opinion of the Court, whether he was entitled to recover that sum of 15*l*. or the sum of 3*l*. only, upon a case which stated in effect as follows: the plaintiff had underwritten 200*l* upon a policy effected at Newcastle (which was set forth verbatim in the case), whereby the ship the Chollerford was insured against capture by the enemy for twelve months, and also against coasting the trade between Leith and the Isle of Wight, beginning 13th of March, 1779, and end-

Tho' a verdict for the defendant, on the ground that the risk never commenced, does not necessarily imp'y that the plaintiff is entitled to a return of premium and tho' the plaintiff has not mentioned it in his opening, yet he is entitled to it when there is a count adopted.

Where the policy contains [495] distinct two very ages, and one risk only has begun, there shall be an apportionment of the premium.

But if a ship is insured against capture for twelve months, at a specified rate per month, making a fixed gross sum, tho' the risk cease before the end of two months by the loss of the ship in a storm, there shall be no apportionment

nor return
of premium
the con-
tract being
entire.

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Hence, if
there be an
insurance
on ship and
goods at
and from
A. to B. du-
ring her
stay and
trade there
at and from
thence to
her port or
ports of
discharge
in C. and
at and from
thence
back to A.
it is an on-
tire con-
tract; and
if the loss
happen at
any time
after the
commence-
ment of the
risk, there
shall be no
apportion-
ment or re-
turn of pre-
mium.

ing the 13th of the same month, 1780. In the body of the policy it was stated that the insurers confessed themselves paid the consideration due unto them by the assured, at and after the rate of 15s. per cent. per month. At the bottom, opposite to the plaintiff's subscription, was written, "premium received 16th of March, 1779;" and on the back was indorsed "Newcastle, 15th of March, 1779. Mr. John Gaul Tomlinson, on his ship the Chollerford, himself master, twelve months in the coasting trade, at and between Leith and the Isle of Wight, beginning the 13th of March, 1779, and ending the 12th of March, 1780. At 15s. per cent. per month, 18l." The premium was not paid, though expressed in the policy to have been paid, it being the usage in Newcastle not to pay the premium at the time of making the insurance, but at various times after the policies are effected, and sometimes not for twelve months after. The ship was lost in a storm within the first two of the twelve months for which the insurance was made, and the defendant tendered to the plaintiff 3l. as the premium for two months. The case then states contradictory evidence given by witnesses on both sides, as to what had been done at Newcastle in similar cases, but the Court of King's Bench was of opinion that it ought not to have been received. After the counsel for the defendant had been heard, the plaintiff's counsel was prevented by the Court from proceeding.

Lord Mansfield said, this is a mere question of construction on the face of the instrument, and, therefore, parol evidence should not be admitted to explain it. It is an insurance for twelve months for one gross sum of 18l. They have calculated this sum to be at the rate of 15s. per month, but what was to be paid down? Not 15s. for the first month, and so from month to month; but 18l. at once. Two cases have been mentioned; *Stevenson v. Snow* was decided on the ground of there being two voyages; *Tyrie v. Fletcher* is directly in point against the defendant. There are two principles in these cases; 1st. If the risk is never begun, the whole premium is to be returned, because there was no consideration. 2nd. When the risk has begun, there shall never be a return, although the ship should be taken in twenty-four hours.

6. *BERRUND V. WOODBRIDGE.* T. T. 1781. K. B. Doug. 781.

Arule had been obtained to show cause why there should not be a new trial in this case. The jury found a verdict for the defendant. The case was this: it was an action on a policy of insurance on the French ship *Le Caolole* and her cargo, and the voyage was described in the policy in the following words: "at and from Honfleur to the coast of Angola, during her stay and trade there, and from hence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur;" the clause respecting the premium was as follows: "Slaves valued at 800 livres Tournois per head, the ship, 1,450l. sterling, other goods, &c." as interest may appear, at a premium of eleven per cent. The ship sailed to Angola, and from thence after staying sometime there, to the West Indies; on her way to Angola she put in at Cayenne, on the coast of America, and from Cayenne she went to Martinia, confessedly out of the way to St. Domingo. In this cause the first question was a question of fact not material to our present inquiry, viz. whether the course taken was a deviation or not from the voyage insured? After all the evidence had been heard, the jury thought it was, and accordingly found a verdict for the defendant. Upon their declaring this opinion, the counsel for the plaintiff insisted, that as there was a count in the declaration for money had and received, the voyage insured ought to be considered as composed of three distinct parts or voyages, viz. 1st. From Honfleur to Angola. 2nd. From Angola to St. Domingo. 3rd. From St. Domingo to Honfleur; and that, as the voyage from St. Domingo to Honfleur had never commenced, the premium ought to be apportioned, and a return made of that part which was paid to insure the risk from St. Domingo to Honfleur. Lord Mansfield took the opinion of the jury upon that point also, and they were clear there ought to be no return. Next day, however, his lordship said he had turned that question in his mind, and that he entertained some doubt upon it, and, as it was a

question of law, desired Mr. Lee to move for a new trial on that ground. It [497] was, however, afterwards moved on both grounds; viz. 1st. On the question of fact whether the deviation was wilful? 2nd. On the question of law whether, supposing it wilful there ought to be a return of premium? These questions were fully discussed by three advocates on each side, and the Court also took time to deliberate upon them, after which the Lord Chief Justice delivered the unanimous opinion of the whole Court.

Lord Mansfield, after stating that upon the question of fact they were perfectly satisfied with the verdict of the jury, proceeded thus: "If, however, the plaintiff should succeed on the second point, the determination would virtually allow him a new trial on the whole of the cause, because no special case was reserved. But, on the fullest consideration, and after looking into all the cases (though my opinion has fluctuated), we are now all clearly of opinion that there ought not to be any return. The question depends upon this, whether the policy contains one entire risk on one voyage, or whether it is to be split into six different risks; for, by splitting the words, and taking at and from separately, it will make six viz.: 1st. At Honfleur. 2nd. From Honfleur to Angola. 3rd. At Angola. The principles are clear. Where the risk has never begun, there must be a return of premium; and if the voyages in this case are distinct, the risk from St. Domingo to Honfleur never begun. Is this one entire risk? The insured and the insurers consider the premium as an entire sum for the whole without division; it is estimated at eleven per cent., and, which is extremely material, there is nowhere any contingency at any period, out or home, mentioned in the policy, which happening or not happening is to put an end to the insurance. The argument must be, that if the ship had been taken between Honfleur and Angola, there must have been a return. But there is an implied warranty, that every ship is seaworthy when she sails on the voyage insured, but she need not continue so throughout the voyage; so that if this is one entire voyage, if the ship was seaworthy when she left Honfleur, the underwriters would have been liable though she had not been so at Angola, &c.; but, according to the construction contended for on behalf of the plaintiff, she must have been seaworthy, not only at her departure from Honfleur, but also when she sailed from Angola, and when she sailed from St. Domingo. The cases of *Stevenson v. Snow*, and *Bond v. Nutt*, were quite different from the present. They depended upon this, that there was a contingency specified in the policy, upon the not happening of which the insurance would cease. In *Stevenson v. Snow* it depended on the contingency of the ship sailing with convoy from Portsmouth, whether there should be an insurance from that place. This necessarily divided the risk, and made two voyages. In *Bond v. Nutt* it was held that there were two risks upon the same principle. "At Jamaica" was one; the other, viz. the risk from Jamaica, depended on the contingency of the ship having sailed on or before the first of August, that was a condition precedent to the insurance on the voyage from Jamaica to London. The two cases of *Tyrie v. Fletcher*, and *Loraine v. Tomlinson*, are very strong; for if you could apportion the premium in any case it would be in insurances upon time. Therefore, on very full consideration, we think this is one entire risk, one voyage, [498] and that there can be no return of premium.—The rule was discharged.

7. *LOWRY v. BOURDIEU*. M. T. 1780. K. B. Doug. 468.

The plaintiffs had lent to Lawson, captain of the Lord Holland East India-man, 26,000*l.*, for which he had given them a common bond, in the penal sum of 52,000*l.*; while he was with his ship at China, the plaintiffs got a policy of insurance, underwritten by the defendant and others, which was in the following terms: "At and from China to London, beginning the adventure upon the goods from the loading thereof on board the same ship, at Canton, in China, &c., and upon the said ship from and immediately following her arrival at Canton, valued at 26,000*l.* being the amount of captain Patrick Lawson's common bond, payable to the parties, as shall be described on the back of this policy, and it bears date 16th of December, 1775; and in case of loss no oth-

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er proof of interest to be required than the exhibition of the said bond, warranted free from average, and without benefit of salvage to the insurer." At the head of the subscription was written, "on a bond as above expressed." Captain Lawson sailed from China, and arrived safe with his privilege (as it is called) or adventure in London, on the 1st of July, 1777, none of the events insured against having happened. The receipt of the premium was acknowledged on the back of the policy. The insured brought this action for a return of the premium, on the ground that the policy being without interest, the contract was void. The cause came on before Lord Mansfield at Guildhall, when his lordship was of opinion that the policy was a gaming policy, prohibited by the stat. of 19 Geo. 2. c. 37. and both parties equally guilty of a breach of the law; that the rule, therefore, of a *melior est conditio possidentis*, was applicable to the case, and the plaintiffs could not recover the premium. A verdict was accordingly found for the defendant, agreeably to his lordship's directions; but the next morning he expressed a doubt as to the propriety of his opinion, because the money had been paid upon an executory agreement, which could never have been completed. A new trial was then moved for.

Lord Mansfield. It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance, mercantile and gaming policies. The first sort are contracts of indemnity only, and from that principle a great variety of decisions and consequences have followed; the second sort may be the same in form, but in them there is no contract of indemnity, because there is no interest on which a loss can accrue. They are mere games of hazard, like the cast of a die. In the present case the nature of the insurance is known to both parties. The plaintiffs say, we mean to game, but we give our reason for it; Captain Lawson owes us a sum of money, and we want to be secure in case he should not be in a situation to pay us. It was an hedge, but they had no interest; for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from Lawson. This, then, is a gaming policy, and against the act of parliament, and therefore it is clear that the Court will assist neither party, according to the well-known rule, that *in pari delicto*, &c. Not that the defendant's right is better than that of the plaintiff's, but they must draw their remedy from pure fountains. I have returned to my old opinion.

Mr. Justice Willes. I shall make no apology for differing from the rest of the Court, in a case where such great abilities have entertained different opinions. The premium has been paid, and yet no risk run, for the policy was void from the beginning, and the insured could not have recovered from the underwriters if the ship had been lost; but I cannot think it a gaming policy. It does not appear to me that the parties had any idea they were entering on an illegal contract. The whole was disclosed, and they thought the contract created an interest. This was a mistake; but it is a new point of law. The case cited from Precedents in Chancery is not perhaps decisive, but it goes a great way; and it would be very hard that a party should lose that which he has paid under a mere mistake. I think in conscience, the defendant ought to refund the premium.

J. Ashhurst and J. Buller concurred with the Chief Justice.

8. HAGEDORN V. OLIVERSON. E. T. 1814. K. B. 2 M. & S. 485.

If A. in his own name, insures on behalf of B. who afterwards refuses to adopt the policy, A. cannot recover back the premi

Plaintiff effected an insurance on ship, as well in his own name as for and in the name of all and every other person, &c. in the usual form, for the benefit of Schroeder, an alien enemy, and procured a licence to legalize the voyage, and a loss happened; and two years afterwards S., by letter to the plaintiff, adopted the insurance.

Per Cur. We think this is a case in which the defendant ought to pay, and the plaintiff ought to receive, for a loss under the policy. A loss has happened, upon which the defendant undertook to pay; and if the premium could have been recovered back from the defendant, there is not any circumstance here which should exonerate him from liability. We think the plaintiff never

could have recovered back the premium from the underwriter, because of the uncertainty whether Schroeder would adopt the assurance in respect of which the underwriter would have incurred the risk. While the contract was in *fiat* there was not any disposition on the plaintiff's part to have the policy vacated, and, if there had been, it would have been an answer to him, that Schroeder might have adopted it. Then comes the question, whether Schroeder is entitled to take the benefit of this insurance? It is stated that this was effected for his benefit; therefore it was intended to cover his specific interest at the time. Schroeder had an interest at the time, and although he was not connected in the concern, it was reasonable for the plaintiff to expect that Schroeder would adopt an act which could be done with no other view than for his benefit. Schroeder must be considered as under a moral if not a legal obligation to adopt it, although the ship arrived. Being under that obligation in all events, he thinks that he is warranted in adopting it even after a loss, and has adopted it. The case of *Routh v. Thompson* shows, that if a policy be effected with reference to the benefit of a person interested, an adoption of it by such person after the loss will be sufficient.

9 *ANDREE v. HITCHES*. E. T. 1789. K. B. 3 T. R. 266.

Special case, stating that a re-assurance was made by the defendant on a French vessel, first insured by a French underwriter at Marseilles, who was living, and who, at the time of subscribing the second policy, was solvent. The Court (Ashurst, Buller, and Grose, Justices,) were unanimously of opinion that this policy of re-assurance was void; and that every re-assurance in this country, either by British subjects or foreigners, on British or foreign ships, is void by the statute, unless the first assurer be insolvent, become a bankrupt, or die.

10 *COWIE v. BARBER* E. T. 1815. K. B. 4 M. & S. 16.

The ship *Jane*, with the goods on board, was seized by the government of Buenos Ayres in 1810, in the river Plate, and within the limits of the South Sea Company's trade. At that time she was without a licence; but, before any knowledge of the capture, the plaintiffs, who were the charterers, procured a licence, dated the 13th of September, 1810, for eighteen months, from the 1st of March, proceeding under the following circumstances: the ship *George Canning*, having a licence from the South Sea Company, sailed with a cargo from this country to the river Plate, and being unable to bring home the whole of her return cargo, the ship *Jane* was sent on from Rio Janeiro, by the agent of the charterers, for the completion of that object and as soon as the charterers were informed of her being so sent, they applied for and procured the above licence. It was contended at the trial, 1st. That the *Jane* required no licence, being covered by the licence to the *George Canning*, which ship was in fact united in the same adventure, and that would satisfy the words of stat. 9 Anne, c. 21. s. 47; but if not, then, 2ndly. It was contended that the licence to the *Jane* was good, though it was admitted that in *Hobler v. Hannam*, N. P. 1 Campb. 95. Lord Ellenborough inclined to a contrary opinion. His lordship now ruled that the licence being to the *George Canning* specifically, could not be extended farther; and that the licence to the *Jane* could not operate retrospectively; and therefore this voyage, not being within the protection of 9 Anne, c. 21. s. 47. the plaintiff was not entitled to recover upon the policy; N. P. 4 Campb. 100. His lordship also inclined to think that, as there was nothing, illegal on the face of the policy, the policy was not under the circumstances void, and the risk never attached, and therefore directed the jury to find for the plaintiff for the premium, giving liberty to the defendant to move for a nonsuit.

Lord Ellenborough, C. J. If the licence cannot operate retrospectively to render the whole lawful, it cannot do so in part only, for the purpose of giving a right to recover the premium; the ship itself was forfeited. If it had appeared that orders were given for procuring a licence, antecedently to the time when the risk commenced, it might have been said that there was not a conspiracy against the act of parliament; but nothing of that sort appears; and

[501] and this is an insurance at and from; therefore it is incumbent on the assured to look to the insurance, that it is lawful at the place where the policy is to attach. Here he acquires the goods within a prohibited district. The policy is effected; the obtaining the licence was an after-thought. The most favourable supposition would be, that there was a previous order for procuring a licence, and under such circumstances, perhaps, a disappointment in fact might not have precluded the assured; but as it is, I am afraid, with every wish to help the plaintiffs I cannot do it.

11. *MARCH v ABEL*. H. T. 1802. C. P. 3 B. & P. 35. *LUBBOCK v. POTTER*. T. T. 1806. K. B. 7 East, 449. *SIFKIN v. GORDON*. E. T. 1810. K. B. 12 Id. 296.

As in the case of a policy on a voyage undertaken in contravention of the navigation laws;

A policy was effected upon a Danish ship at and from Bengal (in which there are Danish settlements) to Copenhagen; and the ship loaded at Calcutta, the contrary to 12 Car. 2. c. 18 s. 1. An objection was taken to the plaintiffs' recovery, on the ground of its being illegal, under the provisions of the 12 Car. 2, c. 18. s. 1. to export goods from Calcutta in any ship not belonging to a British subject; and this objection prevailing, the plaintiffs then insisted that, if the exportation from Calcutta were illegal, the risk never commenced, and that the plaintiffs, therefore, were entitled to a return of the premium. The jury were directed by his lordship to find a verdict for the plaintiffs, liberty being reserved to the defendant to move that such verdict might be set aside, and a nonsuit entered.

Per Cur. It is perfectly settled that in the case of an illegal contract neither party can recover from the other money paid upon the contract; and that rule must prevail in the present case, unless the plaintiffs can establish a distinction in their own favour on the ground of being foreigners, and ignorant of our laws. But we think that we ought not to relax the rigour of our great political regulations in favour of foreigners offending against them, and that there is very little reason to presume ignorance of a law peculiarly applicable to the subjects of foreign states. Upon the whole, therefore, we are of opinion, that the plaintiff is not entitled to recover back the premium.

12 *VANDYCK v. HEDDT*. M. T. 1800. K. B. 1 East, 96.

Or a policy intended to cover a trading with the enemy;

The plaintiff declared upon a policy of insurance on goods at and from London to Embden, or Amsterdam, at a premium of ten guineas per cent, to return five upon their arrival at the place of destination, with an averment that the insurance was made for the benefit of certain persons therein named; and then declared as upon a loss by capture in the course of the voyage insured. The declaration also contained counts for money paid, and for money had and received. The goods were shipped on board a Prussian neutral vessel, on account partly of the plaintiffs, who were naturalized foreigners resident in London, and partly of certain other persons, aliens, then resident in Holland.

[502] At the trial at Guildhall the insurance itself was abandoned, on the ground of its being intended to cover a trading with an enemy's country, Holland being, at the time of such insurance, in a state of hostility with this kingdom, and therefore falling within the decision of the case of *Potts v. Bell*, 8 Term. Rep. 548; but it was contended that the plaintiffs were entitled to recover back the premium, because the policy never attached, and consequently the defendant's risk never commenced. Lord Kenyon permitted a verdict to be taken for the plaintiff for that amount, with liberty to the defendant's counsel to move to set that aside, and to enter a verdict for the defendant. A rule nisi was accordingly obtained for that purpose. The Court of King's Bench, after a consideration of all the cases, held, that where a premium had been paid on a policy to cover a trading with the enemy, though the insurance was void, and the underwriter not compellable to pay the loss, it could not be recovered back.

Lord Kenyon, in giving judgment, observed, that it was impossible to distinguish this case from a common one of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themselves, or the value of them.

The rule has been settled at all times, that where both parties are *in pari delicto*, which is the case here, *potior est conditio possidentis*.

13. WILSON V. ROYAL EXCHANGE ASSURANCE COMPANY H. T. 1811.

N. P. 2 Campb. 626.

The plaintiff declared upon another policy on 300*l.* lent to the captain payable out of the freight. But Lord Ellenborough held that this was not an insurable interest, and, the policy being illegal on the face of it, the premium could not be recovered back.—Plaintiff nonsuited.

14. OOM V. BRUCE E. T. 1810. K. B. 12 East, 225.

The insurance was made by the plaintiff, as agent of John Platoonapp, a Russian subject abroad, in whom the interest was averred to be at the time of insurance and of the loss. The ship, which was nineteen days in loading, was ready, and sailed from the Russian port on the 17th of October 1807, but was brought back on the same day, and confiscated in Russia, hostilities having been commenced by that government against Great Britain on the day before, but which event was, of course, unknown at the time when the insurance was effected by the plaintiffs in London. Lord Ellenborough, C. J., considered that the plaintiffs, having effected the insurance without any consciousness of its illegality at the time, were entitled to recover back the premium, as money had and received by the defendants to their use, without consideration, and they obtained a verdict for the amount. On a motion for a new trial it was said,

Per Cur. To entitle the underwriter to retain the premium, he should have shown that the policy would have attached on any loss happening to the cargo on board the lighters in their way to the ship before the commencement of hostilities, though the contract were not made till after hostilities commenced; but the period to look to, as to the legality of the contract, is the time when it was made; and then the subjects of Russia had become enemies of this country, and it was no longer competent for the subjects of this country to enter into such a contract. But no blame attaches to the plaintiffs, who were ignorant of the fact at the time, and therefore they are entitled to a return of premium.

15. HENTRY V. STAINFORTH. E. T. 1816. K. B. 5 M. & S. 122; S. C.

4 Campb. 270; S. C. 1 Stark. 254.

This was an action, for money had and received, to recover back the premium that had been paid on a policy of insurance; and the facts as stated by the plaintiff's counsel, and which were admitted without proof, were these: The policy was dated on the 20th of November, and was on goods, at and from Riga to Hull. The ship, which was a Swedish one, was chartered for but not the voyage, and by the terms of the charter-party, a British licence for the voyage was to be procured. On the 3rd of September, a letter was written, and sent from Riga to the agent of the assured in England, directing him to procure a licence, and to effect insurance. The letter was delayed beyond the usual time by contrary winds, and was not received till the 5th of October. On the 7th of October, a licence was obtained. The ship sailed from Riga on the 3rd. It was objected that this was an illegal voyage by the stat. 12 Car. 2. c. 18. s. 8. the ship being Swedish, and the goods the produce of Russia; and that the plaintiff, being *particeps criminis*, could not recover back the premium. A verdict was taken for the plaintiff, with liberty to the defendant to move to set it aside and enter a nonsuit. Such a motion was accordingly made; and a rule to show cause granted; and the matter having been argued, it was said, *Per Cur.* Upon consideration we think the plaintiff is entitled to recover back the premium, on the principle of the decision of Oom v. Bruce, *ante*, 502. The objection is, that the contract was illegal, the voyage insured being for the conveyance of Russian commodities from Russia to England in a Swedish ship, and so contrary to the navigation act, 12 Car. 2. c. 18. s. 8; and that the plaintiff, being *particeps criminis*, cannot recover back the money paid on the illegal consideration. But before the time of this insur-

* Or where, by reason of the voyage being protracted to an unusual period, it is not covered by the licence; see *Siffen v. Allant*, 1 M. & S. 39.

Or when the insurance is on money lent to the captain of a ship, payable out of the freight. But if a voyage be unavoidably prevented, a return of premium may be obtained.

[503]

Or where a licence for the voyage has been obtained, granted till after the voyage has commenced, and was there fore invalid because it could not operate retrospectively.

ance a statute had passed, enabling his Majesty to legalize such a voyage by licence; and, in fact, a licence had been granted before the policy was effected, though not until four days after the ship sailed, she having sailed on the 3rd of Oct. and the licence being dated on, and expressly made to be in force from, the 7th of that month. The ship having sailed before the licence was granted, it had been decided, and rightly so, that the policy was void. We think, therefore, that plaintiff is not a party to a violation of the law, and is entitled to recover back his premium as money paid without consideration. Rule to be discharged.

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When the policy is avoided by an alteration by the assured, the premium cannot be recovered back.

16. LONGHORN v. COLOGON. E. T. 1812. C. P. 4 Taunt. 330.

Action upon a policy of insurance, which was subscribed by the defendant in the usual printed form, "upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of, and in, the good ship — at and from London to any port or ports in the Baltic," no words in writing, descriptive of the specific subject of insurance, having at that time been inserted in the policy. No value was declared. After the subscription by the defendant the plaintiff inserted in the policy, in the blank which occurs after the printed words "shall be valued at," striking out the word "at," the words "100 hogsheads of fine sugar, 60 hogsheads of molasses, and 20 tons of fustich." The policy was afterwards signed by several of the underwriters, with the initial letters of their names set against these words, to indicate their approbation of the insertion, and their consent that the assurance should be on those articles; but the defendant had not subscribed his initials, nor was it proved that he had given any verbal assent to this addition. There were several counts in the declaration laying the insurance in different ways. The second count stated, that, with the consent of the underwriters, the insurance was afterwards declared to be on the goods specified. Upon the trial of this cause at Guildhall, at the sittings after Michaelmas term, 1811, before Mansfield, C. J., it was objected upon this instrument that the original policy was discharged by the alteration, and that the defendant had never subscribed or assented to the altered policy. It was also urged, that this was such an alteration in the subject-matter of the insurance as required a new stamp, as a new contract, and was not cured by the statute 35 Geo. 3. c. 63. s. 13. Mansfield, C. J., nonsuited the plaintiff, reserving to him liberty to move to enter a verdict. On a motion to this effect, the Court said, the instrument is different from what is stated in the only count on which the plaintiff could have recovered at the trial. The alteration is a very material one. When once a declaration of interest is made, the policy attaches, not on any goods the plaintiff might put on board, but on those comprehended in that declaration. The instrument, therefore, as to those who do not assent to that declaration, is gone. As to a return of premium, suppose the assured tears the seal off his policy; can he by his own act compel the assurer to return the premium? The underwriter has fulfilled all his part; the assured can no more compel the underwriter to return the premium, than the underwriter can compel him to relinquish the contract. As to the case to which this is compared, of effecting an assurance and not putting any goods on board, it is understood to be an implied term of the contract of insurance, that if the goods are not put on board the money shall be returned; here the law avoids the contract by an accident, unforeseen, and unintended, but the premium cannot be returned; and it rests with the conscience of the defendant whether he will pay this money or not. The law upon the subject is plain.

[505]

An arrival of the ship entitles to the stipulated return of premium notwithstanding

17. AGUILAR v. RODGERS. M. T. 1707. K. B. 7 T. R. 421.

Policy on freight. This clause was found to return 10l. per cent. if the ship sailed with convoy, and arrived. It was contended at the bar, that although the ship sailed with convoy, and although she arrived at her port of destination, yet as she had been captured and recaptured during the voyage, and had paid salvage to the recaptors, the plaintiffs (the assured) were not entitled to a return of premium within the true construction of the above clause. Lord Kenyon delivered the unanimous opinion of the Court, and agreed

with the counsel for the defendant, that every arrival of the ship at her port of capture or destination, would not be an arrival within the fair construction of this memorandum; such, for instance, as an arrival in the possession of an enemy at a neutral port; or an arrival at her port in England as the property of other persons after a capture. But in order to satisfy the meaning of the memorandum, it should be an arrival at the destined port in the course of her voyage.

It is now too late to controvert the authority of *Hamilton v. Mendes*, even if we were disposed to do so, which I am not, where it was holden, that though the assured may abandon and the ship be afterwards recaptured, it must be considered as if she had never been out of the possession of the owners. It is eighteen years since the case of *Simond v. Boydell* was decided; that case must be well known to the commercial world; and if the parties in this case had intended to make an agreement different from that which the words used in this memorandum import, they would have added after arrival, "safety from the enemy," or some words to that effect. But the words here used are not equivocal, and we ought not to depart from them; it would be attended with great mischief and inconvenience if, in construing contracts of this kind, we were not to decide according to the words used by the contracting parties. Suppose this question had arisen on a contract under seal, and an action of covenant had been brought, assigning as a breach the non-arrival of the ship at the port of London; the answer that in fact the ship did arrive there in the course of her voyage would have been decisive. And if so, this memorandum must receive the same construction in this action. On the grammatical construction of these words, which is the safest rule to go by, we are of opinion that the verdict obtained by the plaintiff ought not to be set aside.

18. *KELLNER v. LE MESURIER*. M. T. 1803. K. B. 4 East, 396. S. P. *LEAVER v. CORMACH*. T. T. 1812. C. P. 4 Taunt. 483. *DALGLEISH v. BROOKE*. E. T. 1812. K. B. 15 East, 295. *contra*.

This was an action on a policy of insurance, made the 11th of September, 1795, by the plaintiff, as agent upon the ship *Princess Louisa*, "at and from Lisbon to Cadiz, and at and from thence to Flushing." The premium was stated to be "at and after the rate of twenty guineas per cent., to return 8l. per cent. if the said ship or vessel sailed from Cadiz with convoy for England, and 2l. per cent. more for convoy from England to Flushing, or 10l. per cent., if with convoy for the voyage and arrived." The declaration contained no averment of interest in any particular person; but alleged "that the ship was not at the time of making, effecting, or subscribing the policy, nor of the happening of the loss, the property of or belonging to the King or any of his subjects." This allegation was made in order to take the case of this ship, as far as the allegation in question was competent for the purpose, out of the provision of the stat. 19 Geo. 2. c. 37. s. 1. whereby assurances, interest or no interest, "on any ship belonging to his Majesty or any of his subjects," was prohibited. It is to be observed that this allegation predicated nothing as to the property in the ship from the time of the commencement of the risk covered by the policy, but only from a subsequent period, that of effecting the policy. The declaration then stated that the ship departed from Lisbon and arrived in safety at Cadiz, and afterwards departed from Cadiz with convoy for England, in prosecution of her voyage, and arrived; but that afterwards, and before her voyage could be completed, she was taken as prize by his Majesty, and wholly lost. To this count upon the policy of assurance there was a demurrer, and a joinder in demurrer; and upon the argument thereof several questions have been made. One was whether any return of premium be demandable under the policy, in the events which have happened of a departure of the ship with convoy from Cadiz for England, the ship not having afterwards arrived at Flushing, where the voyage was to terminate? Upon this point the Court were of opinion that no return of premium was demandable within the meaning of the policy, no arrival at Flushing, the ultimate port of destination, having in this case taken place. That the words "and arrived," annex a condition which overrule and govern equally all the several stip-

Where the return of premium is to be more or less, according as the ship sails with convoy for longer or shorter portions of the voyage, a clause added after the last stipulation for a return of "and arrived," is a condition annexed to all the rest.

ulations contained in the policy for a return of premium in the events of a sailing with convoy for the different parts and subdivisions of the voyage; that is to say, the return of 8l. per cent. for sailing from Cadiz with convoy for England, and 2l. per cent. more for convoy from England to Flushing, as well as to the return of 10l. per cent., the sum total of these several returns, for a sailing with convoy for the whole voyage. By inverting the order of these three different provisions respecting returns of premium, and taking the last first, it will place the matter in a clearer point of view. The stipulation about premium and its return will then stand thus: at and after the rate of twenty guineas to return the 10l. per cent. if the ship sail with convoy for the voyage and arrive; if from Cadiz with convoy for England, 8l. per cent.; and 2l. per cent. more for convoy from England to Flushing. In this mode of arranging the provisions respecting returns of premium, the word "arrived" is naturally, in point of construction, carried forward and united successively with each branch of these provisions, and operates plainly as a condition equally affecting them all. Indeed it is impossible to assign a reason why the total amount of the two several parts of the premium thus divided and appointed, with reference to the risks of the two several parts of the voyage, should be made returnable only upon the event of arrival at the end of the voyage; and why the several parts of the premium should respectively be made returnable on account of the mere sailing with convoy for the respective parts of the voyage, independent of the same event of ultimate arrival; and this too when the underwriter should ultimately have derived no benefit from such partial convoy, but should still have a total loss to pay. Another point was made, whether the allegation respecting the property of the ship showed it to have been foreign during the whole period of the risk insured, so as to render the one entire risk in the manner in which it was insured a valid subject of insurance within the stat. 10 Geo. 2. c. 37, s. 12. And next, supposing the allegation in question not to be sufficient for that purpose, then, whether it may not be rejected as surplusage, which depends on this question, viz. whether any allegation on the subject were at all necessary to be made on the part of the plaintiff, and whether it were not incumbent on the defendant to have shown that the property was not insurable in virtue of the provisions introduced by that statute, by analogy to the statute of frauds, and the cases on common law pleading which have been cited as in respect to that statute; in other words, whether the stat. 19 Geo. 2. has rendered any other mode of declaration on the subject of interest necessary than what was usual and deemed sufficient before that statute. The last and principal point which was made on the part of the defendant (assuming that the ship in question has been well insured as a foreign ship, without any averment of interest) was this: whether an insurance upon a foreign ship underwritten generally against capture by a British subject be a valid insurance, competent in point of law to charge such British underwriters in the event which has happened, that is to say, of a capture of such ship by his Majesty. And inasmuch as we are of opinion in favour of the defendant upon this latter ground of objection to the action, it renders it wholly unnecessary for us to consider the two immediately preceding questions, which relate to the sufficiency of the allegation in the declaration in respect to the property in the ship as being foreign, and the necessity in point of law which the plaintiff might or might not be under to have made any allegation at all on the subject. As to the last ground of objection to the validity of this insurance, it immediately involves this question, and has been properly so argued, viz. whether an insurance made in its terms against capture generally can be legally carried into effect so as to operate as an indemnity against an act of hostile capture on the part of his Majesty and his subjects, in favour of an enemy (for such the proprietor of this ship must be taken to be at the time of the capture in question), the ship having been, as alleged, taken as prize by his Majesty, and which *prima facie* imports that it was duly so taken. And upon full consideration of the subject, we are of opinion that this last ground of objection is well founded, and that no action can be obtained upon this policy to recover the loss in question.

19. *SIMOND v. BOWDELL*. M. T. 1779. K. B. Doug. 28. S. P. AUSELEY
v. DUFF. H. T. 1800. C. P. 2 B. & P. 111.

This action was brought against an underwriter for a return of premium. Where part of the premium is to be returned if the ship sails with convoy and arrives, she need not arrive in company with convoy.*

The material part of the policy was in these words: "At and from any port or ports from Grenada to London, on any ship or ships that shall sail on or between the first of May, or the 1st of August, 1778, at eighteen guineas per cent., to return 8l. per cent. if she sails from any of the West India Islands with convoy for the voyage and arrives." At the bottom there was a written declaration, that the policy was on sugars, the Muscovado valued at 20l. per hoghead, on account of L. Q., being on the first sugars which shall be shipped for that account. The ship Hankey sailed with convoy within the time limited, having on board fifty-one hogheads of Muscovado sugar, belonging to L. Q.; she arrived safe in the Downs, where the convoy left her, convoy never coming farther, and indeed seldom beyond Portsmouth. After she had parted with the convoy she struck on a bank called the Pon Sand, at Margate, and eleven of the fifty-one casks of sugar were washed overboard, and the rest damaged; the ship was afterwards got off the bank, and proceeded up the river, arrived safe at the port of London and was reported at the Custom House. The sugars saved were taken out at Margate, and after undergoing a certain cure by a person sent from town for that purpose, they were carried to London in other vessels, and the forty hogheads being sold, produced 340l. instead of 800l., which was their valuation in the policy. The defendant had paid into court the value of the sugars lost, and a return of 8l. per cent. on 340l. The plaintiffs insisted that they were entitled to have 8l. per cent. also returned on the price of the eleven hogheads of sugar which were lost, and on the difference between what the remaining forty hogheads produced and their valued price. At the trial before Lord Mansfield the plaintiffs had a verdict for the full amount of their demand. The chief question, upon the motion for a new trial, was to what the word "arrives" was intended to apply?

Lord Mansfield. The ancient form of a policy of insurance, which is still retained, is in itself very inaccurate, but length of time, and a variety of discussions and decisions, have reduced it to certainty. It is amazing, when additional clauses are introduced, that the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition made which has not created doubts on the construction of it; here a word or two more would have rendered the whole perfectly clear. However, I have no doubt how we must construe this policy. Dangers of the sea are the same in peace or war; but war introduces hazards of another sort, depending on a variety of circumstances, some known, others not, for which an additional premium must be paid. Those hazards diminished protection of convoy, and if the insured will warrant a departure with convoy there is a diminution of the additional premium. If the insured will not warrant a departure with convoy, he pays the full premium, and in that case the underwriter says, "If it turn out that the ship departs with convoy, I will return part of the premium." But a ship may sail with convoy, and be separated from it by storm or other accident in a day or two, and lose its protection. On a warranty to sail with convoy that would not be a breach of the condition; but to guard against that risk the insured adds, in policies of the present sort, "the ship must not only sail with convoy, but she must arrive, to entitle me to the return." The words, "and arrives" do not mean that the ship shall arrive in the company of the convoy, but only that she herself shall arrive; if she does that shows either that she had convoy the whole way, or did not want it. But in the stipulation for the return of premium no regard is had by the parties to the condition of the goods on the arrival of the ship. The construction contended for by the defendants, is adding a comment longer than the text. If it had been meant that no return should be made unless all the goods arrived

* And where the ship sails with convoy and arrives, but the goods insured are afterwards lost, the insured is entitled to a return of premium as well as to a total loss; see *Horncastle v. Howarth*, 2 Marsh. Ins. 681.

safe, they would have said, "If the ship arrive with all her goods," or "safely with all the goods." The total or partial loss of the goods was the subject of the indemnity, and must be paid for by the underwriters. But as to the return of the additional premium, whether the goods arrive safe or not, makes no part of the question.

20. *TYLER v. HORNE*. H. T. 1785: 1 Park, Ins. 480.

Although generally, when the policy is vitiated by concealment, with out any fraud, and the premium is restored, yet if the fraud is notorious, the Court will order the underwriter not to return the premium; Or, where a policy is purposely underwritten by one party to induce another to sign.

Action was brought by the insured to recover 150*l.*, being the amount of the defendant's subscription; the ground of refusal was, that that insurance was fraudulent, and that the plaintiff knew of the loss of the ship at the time of effecting the policy. The counsel for the plaintiff were under the necessity of admitting that their client had made some fraudulent insurances upon this very ship, subsequent to the one now in dispute; but contended that the news of the loss of the ship had not arrived till after this particular one was effected. The evidence, however, was so strong, as easily to convince the jury that the plaintiff had received information of the loss before the order for making the insurance was given to the broker, and they found a verdict for the defendant.

Lord Mansfield said, the fraud was so gross, that the premium should not be recovered from the underwriter.

21. *WILSON v. DUCKETT*. M. T. 1762. K. B. 3 Burr. 1361. S. P. *TYLER v. HORNE*. H. T. 1785. K. B. Park, 329.

Action on a policy of insurance on a ship, with a count of a general *indebitatus assumpsit* for money had and received to the plaintiff's use; and damages were laid at 98*l.* The trial was had under a decree of the Court of Chancery, where the now defendant, the insurer, being there complainant, had offered to pay back the premium which was 10*l.* No money was, in the present case, paid into court, though the usual course in these cases is for the defendant, the insurer, to bring the premium into court. The jury found a verdict for the plaintiff for the 10*l.* premium on the count for money had and received to his use, although they were of opinion against the policy, upon the fact of fraud, and found against it as being fraudulent. In fact, the first underwriter was only a decoy-duck to induce other persons to underwrite the policy; and it had been previously agreed between the insured and him, that he should not be liable by signing the policy which this court considered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence of Lord Mansfield (before whom this case was tried), and of the counsel on both sides, it was agreed to bring this question before the Court: whether upon a policy of insurance being found fraudulent, the premium should be returned to the plaintiff the insured, or retained by the defendant, the insurer?

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Lord Mansfield inquired of the counsel, whether there was any common law determination in the affirmative? As it did not appear that there was, his lordship said it was plain what must be done, in this case: for he looked upon the complainant's bill in equity to be the same thing as if the money had actually been brought into court, and directed a verdict to be entered for the defendant.

22. *CHAPMAN v. FRASER*. T. T. 1792 K. B. 1 Park, Ins. 286

The whole Court of the King's Bench were of opinion that in all cases of actual fraud on the part of the assured or his agent the underwriter might retain the premium.

23. *BOEHM v. BELL*. H. T. 1799. K. B. 8 T. R. 154.

The captors of a ship and cargo effected an insurance. Restitution was afterwards awarded to the owners, with the exception of a small part of the cargo. It has been held, that the captors of ships seized by them as prize have an insurable interest in them for the voyage home, for the purpose of bringing them to adjudication in the Admiralty; so that, although the Court of Admiralty should ultimately adjudge them to be no prize, and award restitution to the original owners, the captors are not entitled to a return of premium. Lord Kenyon observed, that if it were a legal capture the captors

And it is now settled that in all cases of actual fraud on the part of the insured, or his agent, the underwriter may retain the premium. When the captors of a ship insure their interest therein they are not

were entitled; if the capture were improperly made, they were liable to be called to account in the Court of Admiralty, where they might be awarded damages and costs. They had, therefore, a right to insure themselves against the decision that might have loaded them with damages and costs. On this short ground I am of opinion that the assured had an insurable interest, that the risk was begun, and that there can be no return of premium.

24. *MEYER v. GREGSON*. E. T. 1798. K. B. 2 Marsh. Ins. 666. S. P. AN-

NEN v. WOODMAN. M. T. 1810. C. P. 3 Taunt. 299.

A verdict had been given for the plaintiff. Upon a motion to set aside the verdict, and to enter a nonsuit, it appeared that the insurance was at Jamaica to Liverpool, warranted to sail at or before the 1st of August; premium 20 guineas per cent., to return eight if she sailed with convoy. The ship did not sail till September, and was lost. The jury apportioned the premium, and gave the plaintiff a verdict for eight guineas, the defendant having paid for the convoy into the court, which was allowing four for the risk run by the defendant at Jamaica. Lord Mansfield. It would be endless to go into inquiries about the risk at Jamaica. It appears on the evidence different on different sides of the island. Besides, the parties have divided the risk with respect to the convoy; for it is a premium of twenty guineas, to return eight if she sails with convoy. But there is an absolute warranty as to the sailing, and nothing said of the premium. Mr. Justice Willes thought the premium should be apportioned. Mr. Justice Ashhurst and Mr. Justice Buller agreed with Lord Mansfield, the latter observing, that as the parties have not considered it as two risks, nor estimated the risk at Jamaica, the Court cannot do it for them. In all the insurances from Jamaica the policy runs "at and from;" and though, in many instances, the voyage has not begun, yet there never was an idea of the premium being returned, and that no usage was found by the jury. The rule for entering the judgment of nonsuit was made absolute.

25. *ALLEN v. LONG*. E. T. 1765; 2 Park, Ins. 580; S. C. 2 Marsh. 668.

Action for a return of the premium. The policy was "at and from Jamaica to London, warranted to depart with convoy for the voyage, and to sail on or before the 1st of August, upon goods on board a ship called the Jamaica, at a premium of twelve guineas per cent." The ship sailed from Jamaica to London on the 31st of July, 1782, but without any convoy for the voyage. At the trial before Mansfield C. J., the jury found a verdict for the plaintiff, subject to the opinion of the Court upon a case, stating the facts already mentioned; in addition to which they expressly find that it is the constant and invariable usage in an insurance at and from Jamaica to London, when the ship does not depart with convoy, or sails after the 1st of August, to return the premium, deducting one-half per cent.

Lord Mansfield. An insurance being on goods warranted to depart with convoy, the ship sails without convoy, and an action is brought to recover the premium, the law is clear, that if the risk be commenced, there shall be no return. Hence, questions arise of distinct risks insured by one policy or instrument. My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionment, and therefore the Court has sometimes leaned against them. But where an express usage is found by the jury the difficulty is cured. They offered to prove the same usage as to the West-Indies in general, but I stopped them, and confined the evidence to Jamaica. Mr. Justice Willes and Mr. Justice Ashhurst concurred with his lordship.

Mr. Justice Buller. The counsel for the defendant did right in his argument to make the chief question, whether parol evidence of this usage ought to have been received? In mercantile cases from Lord Holt's time, and in the policies of insurance in particular, a great latitude of construction as to usage has been admitted. By usage, places come within the policy which are not expressed in words; usage explains and even contracts the policy. The usage here found by the jury is universal; and though in many cases one-half per cent. may be a small premium for the risk, yet the underwriters are aware that it is so. In *Mayer v. Gregson* no usage was found,

[512] Besides, in cases of this kind, where everything is left to the whim and caprice of a jury, I lean much against them. Here a general and certain usage is found, and no inconvenience can result from it. The *postea* was delivered to the plaintiff.

26. *Tait v. Levi*. M. T. 1811. K. B. 14 East, 481.

The rule by which the insured is entitled to return the whole premium, when the risk has once commenced, necessarily precludes his liability for a return in case of deviation.

This was an action on a policy of insurance on the ship *Catharine*, and goods, at and from Cork, to the ship's loading port or ports on the coast of Spain, within the Straits of Gibraltar, including Tarragona, and not higher up the Mediterranean, during her stay there, and from thence to London, with liberty to discharge and take in goods at whatever place she might touch at, &c. Tarragona was then in possession of our Spanish allies, and Barcelona, another port of Spain, which lies further up the Mediterranean, was in possession of the French enemy. It was the intention of the captain to go into Tarragona, but a current, as he supposed, carried the vessel beyond it in the night, and the captain, being entirely ignorant of the coast, mistook Barcelona for Tarragona, and was entering the former port, when he was captured by the French. The two towns were proved to be not at all alike in their appearance from the sea. Lord Ellenborough, C. J., was of opinion, that the underwriters were not liable for this *crassa negligentia* or *ignorantia* on the part of the captain, which did not amount to barratry, as not being a wilful misconduct or fraud on his part, and therefore nonsuited the plaintiff.

Per Cur. We doubt much whether this case can be put on the ground of deviation, because there was no intention in the captain to deviate, but he intended to go into Tarragona, though he mistook Barcelona for his intended port through his entire ignorance of the coast. But, upon the ground of want of competent skill and knowledge of the coast on the part of the captain, when the very object of the policy required discriminating knowledge in that respect, and there being no other part of the crew capable of supplying that want of knowledge, and the loss happening on that account, we are of opinion that the assured is not entitled to recover upon the subsequent deviation; but,

Lord Ellenborough, C. J., said, that on his present view of the question, he could not advise the premium to be paid into court; for if the captain without just cause, got out of his prescribed limits, he got out of the policy. And the majority of the court appeared to concur in this.—The rule was refused generally.

And in the case of a policy on freight when the ship is chartered for the voyage, and is guilty of a deviation after sailing upon it, and before any goods are laden, the insured are not entitled to a return of premium for short interest.

[513] Where there is an insurance on ship and freight, and the ship or

27. *Moses v. Pratt*. M. T. 1816. N. P. 4 Campb. 297.

Action on a policy of insurance at and from port or ports in Cuba to port or ports in St. Domingo, and from thence to any port or ports in the United Kingdom, on the ship *Argus*, valued at 2,000*l.*, and her freight, valued at 3,000*l.* By a charter-party dated 7th October 1814, the plaintiff let the *Argus* to freight to T. Garnett, covenanted to load her with a complete homeward cargo, and to pay freight for the same at a stipulated rate. The *Argus* proceeded to Cuba, and St. Domingo, where no cargo was provided for her and was guilty of a deviation by going to a port in Jamaica before the loss happened which the plaintiffs sought to recover.

Lord Ellenborough. Had the ship been lost while waiting to take in a cargo, the underwriters would have been liable for the whole sum insured upon the freight. The charter-party created an interest on which the policy had attached, and there had been an inception of the risk, although no goods were put on board; therefore there can be no return of premium.

28. *McCulloch v. Royal Exchange Assurance Company*. E. T. 1813. N. P. 3. Campb. 406.

Insurance on ship and freight. The ship arrived in safety and earned freight. The assured claimed a return of premium, on the ground that he had no insurable interest on account of a defect in his title to the ship.

Lord Ellenborough. In *Rough v. Thompson* a loss had happened, and an action was brought against the underwriters to recover the sum insured. They resisted the demand, on the ground that there was no insurable interest. As they denied their liability on the policy, they were not, under these circum-

stances, allowed to retain the premium; but here the voyage has been performed, and the ship has arrived in safety. The freight has been earned and paid. It strikes me as now too late to rip up the matter, and to say you had no insurable interest. You might have rescinded the contract before the event; but after that has been determined in favour of the underwriters; it does not lie in your mouth to tell them they were never liable, and that the premium was a payment without consideration. I am perfectly clear the plaintiff had no right to recover. It would place underwriters in a very awkward situation, if, after the safe arrival of the ship, the assured could come to them and say, "We had no legal title to her, on account of some secret transactions which you had no means of investigating; we had no insurable interest, and you must pay us back the premium which you imagined you had earned."

(A c) RELATIVE TO DOUBLE AND RE-INSURANCE.

1. *GODEN v. LONDON ASSURANCE COMPANY.* H. T. 1758. K. B. 1 Burr. 492.

Lord Mansfield stated, in delivering the opinion of the Court, the facts as they appeared: Mr. Meybohm, of St. Peterburgh, had dealings with Mr. Amyand and Company of London, who often sent ships from London to Mr. Meybohm, at St. Petersburg. Meybohm, as appeared by the evidence, was indebted on the balance of their accounts to Amyand and Company; Amyand and Company sent a ship, called the Galloway, Stephen Barker, master, to Mr. Meybohm, at St. Petersburg, to fetch certain goods. Meybohm sent the goods, and promised to send the bill of lading by the next post, but never did. Afterwards, in August, 1756, Amyand and Company got a policy of insurance from private underwriters for 1,100*l.* on the ship, tackle, and goods, at and from London to St. Petersburg, and at and from thence back again to London, which policy was signed by several private underwriters, quite different persons from the present defendants; and of this sum, 1,100*l.* thus underwritten, 500*l.* was declared to be on 11-60 parts of the ship, and remaining 600*l.* to be on goods. Between the 26th of August and 28th of September, 1756 (both included), Mr. Amyand insured 800*l.* more with other private insurers; and this latter insurance upon goods only, was only at and from St. Petersburg to London. On the 28th, 29th, and 30th of October, 1756, Mr. Amyand insured 900*l.* more, with other private insurers, which last insurance was on goods only, at and from the Sound to London; so that the whole sum insured by Amyand and Company was 2,800*l.*, of which the sum of 2,300*l.* was on goods, and the remaining 500*l.* was on the ship. Several letters being given in evidence, it appeared that Meybohm wrote from Petersburg on the 7th of September, 1756 (the date of his first letter on this subject), to Amyand and Company, and mentioned what goods he should send to them, referring to the invoice for particulars; and directed them to get insurance thereon, and to place the goods and the insurance to a particular account, which he named in his letter, in which he also specified some iron, which was for Mr. Amyand's own account. This letter Mr. Amyand afterwards received (probably about the 27th of October), and in consequence of it, made the insurance accordingly upon the 28th, 29th, and 30th of the same October as before mentioned. Meybohm, having shipped the goods, indorsed the bills of lading to one Mr. J. Tamesz in Moscow, (the plaintiff, in effect, in the present action), who on the 7th of October, 1756, wrote to his correspondent, Mr. Uthoff, here in London; to insure these goods; in this letter he desires Mr. Uthoff to insure the whole, that he (Tamesz) might be safe in all events; for he suspected that these goods were intended to be consigned by Meybohm to somebody else, and perhaps might be insured by some other persons; and he says they were transferred to him in consideration of his being in advance to Meybohm more than their amount. This letter from Mr. Tamesz, with these directions to insure, was received by Mr. Uthoff on the 15th of November, 1756. Mr. Uthoff accordingly applied to the defendants, the London Assurance Company, and disclosed to them at the same time all these particulars; and they, upon the 16th of November, 1756, after being thus apprised that there might be another insurance, made the insurance now in question, for 2,316*l.* on the goods at

rive in safety and earn freight, the insured can not after wards claim a return of premium, on the ground that he had an insurable interest on account of a defect in his title to the ship.

Double insurances are legal; they occur when several policies are effected for the benefit of the same persons, and upon the same subject matter.

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and from the Sound to London. The goods were lost in the voyage. Mr. Uthoff's insurance was made by the plaintiffs Godin, Guyon, and Company, who are insurance brokers, by order of Henry Uthoff, Esq. This declaration is indorsed upon the policy, and is dated the 18th of November, 1756. There is no doubt as to the value of the goods or as to the loss of them. It is admitted by the defendants that the plaintiffs ought to recover half the loss from them, but they say they ought to pay only one half not the whole loss. So that the only question is, whether the plaintiffs are entitled, upon the circumstances of this case, and upon the facts I have been stating, to recover the whole loss from the present defendant, or only the half of his loss from them, and the remainder from the underwriters of Mr. Amyand's policy? The verdict is found for the plaintiff for the whole; but it is agreed to be subject to the opinion of this Court upon this question I have just mentioned. First, to consider it as between the insurer and the insured; as between them; and upon the foot of commutative justice merely there is no colour why the insurers should not pay the insured the whole; for they have received a premium for the whole risk. Before the introduction of wagering policies, it was upon principles of convenience, very wisely established that the insured should not recover more than he had lost. Insurance was considered as an indemnity only in the case of a loss, and, therefore, the insurance ought not to exceed the loss. This rule was calculated to prevent fraud, lest the temptation of gain should occasion unfair and wilful losses. If the insured is to receive but one satisfaction, natural justice says, that the several insurers shall all of them contribute *pro rata*, to satisfy that loss, against which they have all insured. No particular cases are to be found on this head, or at least none have been cited by the council on either side. Where a man makes a double insurance of the same thing in such a manner that he can clearly recover against several insurers in distinct policies a double satisfaction, the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it. And if the same man really and for his own proper account insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person; yet that is just the same thing, for the same person is to have the benefit of both policies. And if the whole should be recovered from one, he ought to stand in the place of the insured to receive contribution from the other, who was equally liable to pay the whole; but in this case, if Tamesz was not to have the benefit of both policies in all events, then it can never be considered as a double policy. It has been said that the indorsement of the bills of lading transferred Meybohm's interest into all policies by which the cargo assigned was insured, and therefore, Tamesz has a right to Mr. Amyand's policy, and that Tamesz, being the assignee of Meybohm, is *cestui que trust* of it, and may recover the money insured; and even that he may bring trover or detain for the very policy itself; and it is urged from hence that he either will or may have a double satisfaction for the same loss. But allowing that, by the indorsement of the bills of lading and assigning the cargo to Tamesz, he stands in the place of Meybohm in respect to his insurance, yet Mr. Amyand has an interest of his own, and had actually insured the ship and goods to the amount of 1,900*l.* (upon both together) prior to any directions or intimation received from Mr. Meybohm to insure for him. Various people may insure various interests on the same bottom (as one person for goods, another for bottomry, &c.) And here Mr. Amyand had an interest of his own distinct from that of Mr. Meybohm: he had a lien upon these very goods as a factor to whom balance is due; and he had the sole interest in the ship, which was a part of the things insured by him. It is far from appearing that even his last insurance in October was made on the account of Meybohm, or as agent for him. So far from it, Mr. Amyand insists upon it for his own benefit (as he expressly declared at the trial), and absolutely refuses to give it up or to suffer his name to be used by the plaintiff, though he was a witness for the defendants, and was produced by them and inclined to serve them; so that the foundation of this argument, urged by the de-

defendant's counsel, fails them, and there is in reality nothing to support it. But [516]
 even supposing Mr. Amyand had made his insurance, not upon his own account, but as agent or factor for Mr. Meybohm, yet even then Tamesz can never come against Amyand's underwriters, or come at Amyand's policy for his own use; for Amyand, the factor for Meybohm, has possession of the policy, and appears to have been a creditor of Meybohm upon the balance of accounts between them at the time when he made the insurance; and I take it now to be a settled point, that a factor to whom a balance is due has a lien upon all goods of his principal, so long as they remain in his possession. *Kreuger and others v. Wilcox and others*, was a case in Chancery; upon this point it came on first before Sir John Strange, then Master of the Rolls, who decreed an account, and directed allowances to be made for what the factor had expended on account of the ship or cargo, and reserved all further direction till after the master's report; it came on again afterwards for further directions after the master's report, before the Lord Chancellor, who was attended by four eminent merchants, whom he interrogated publicly; after which he took time to consider of it: and on the first of February, 1755, decreed that the factor has lien on goods consigned to him, not only for incidental charges, but as an item of mutual account for the general balance due to him, so long as he retains the possession. But if he part with the possession of the goods, he parts with his lien, because it cannot then be retained as an item for the general account. There was another case in the same court, *Gardner v. Coleman*, a few months after, in which the former case, determined as I have mentioned, was considered as a point settled; and this latter case of *Gardner v. Coleman* was decreed agreeably to it. So that Mr. Amyand, even considered as a factor or agent to Meybohm, and as making the insurance upon Meybohm's account, is yet entitled to retain the policy; Meybohm being indebted to him upon the balance of the account between them, and he has a lien upon the policy while it continues in his possession; therefore, even in this view of the case, Mr. Tamesz must first pay Mr. Amyand the balance of Amyand's account before he could have gotten that policy out of Amyand's hands; and consequently Mr. Tamesz was very far from being entitled to the benefit of it as a *cestui que trust* absolutely and entirely. But if the question, whether Tamesz could take the benefit of Amyand's policy were doubtful, yet here Tamesz insured the goods with the defendants, expressly under the declaration of his suspicion that there might have been a former insurance made upon the goods by some other person, but he desired to insure the whole for his own security; to this the defendants agreed, and took the whole premium. Mr. Amyand insisted upon his right to the whole benefit of his own policy when he was examined as a witness, and is now litigating it in Chancery; it would neither be just nor reasonable that Tamesz should only recover half his loss from the defendants, and be turned for the other half to an uncertain event of a long and expensive litigation. I do not believe there ever will or can be a recovery by Tamesz, or those who shall stand in his place, against Amyand's underwriters. However, if these underwriters are liable to contribute at all, the contribution ought to be among the several insurers themselves; but Tamesz, the insured, has a right to recover his whole loss from the defendants, upon the policy now in question, by [517]
 which they are bound to pay the whole; for though here be two insurances, yet it is not a double insurance, to call it so is only confounding terms. If Tamesz could recover against both sets of insurers, yet he certainly could not recover against the underwriters of Amyand's policy without some expense, nor without also first paying and reimbursing Mr. Amyand the premium he paid, and also his charges. This is by no means within the idea of a double insurance; the two persons may insure different interests, each the whole value, as the master for wages, the owner for freight, &c. But a double insurance is, where a man is to receive two sums instead of one, or the same twice over for the same loss; by reason of his having made two insurances on the same goods on the same ship, Mr. Tamesz is entitled to receive the whole from the defendants upon this policy, whatever shall become of Mr. Amyand's

policy, and they will have a right, in case he can claim any thing under Mr. Amyand's policy, to stand in his place for a contribution, to be paid by the other underwriters to them. But still they are certainly obliged to pay the whole to him. Therefore upon, these grounds and principles in every light in which the case can be put, we are all of us clearly of opinion that the verdict is right as it now stands for the whole, and that the *postea* must be delivered to the plaintiff.

2. *ROGERS V. DAVIS*. M. T. 1800. K. B. Park, Ins. 424.; S. C. Marsh. Ins. 342. S. P. NEWLEY V. REED. E. T. 1795. K. B. 1 Bl. Rep. 416. DA. VIS V. GILDART. 2 Park, Ins. 424.

In such case, if the insurers in one policy should pay the whole amount of the loss, they will be entitled to recover a rateable contribution from the insurers in the other policy.

It however affords no defence to an action on such a policy, to prove that [518] the insured have received the amount of valuation from the underwriters on an other policy, if the subject-matter insured be proved to be of a value equal to the sum received, and that ought to be recovered. In mutual insurances all parties must be contributory.

Action on a policy of insurance on a ship and goods from Newfoundland to Dominica, and from thence to the port of discharge in the West Indies. It was a valued policy on the ship and freight, and on the goods as interest should appear. The ship sailed from St. John's on the 17th of December, 1775, and the plaintiff declared as for a total loss. The defendant underwrote for 200*l.*, and has paid into court 120*l.* This sum was paid on a supposition that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at Liverpool, on a voyage from Newfoundland to Barbadoes and the leeward islands, with an exception of American captures; but the plaintiff afterwards, for the purpose of securing himself, having altered the course of his voyage, made the present insurance. The plaintiff now insisted he was entitled to receive the full amount of his insurance against the defendant, and not to any part from the Liverpool underwriters, because the voyage now insured was different from that insured at Liverpool. There was, however a verdict for the plaintiff for his full demand, with liberty for the defendant to bring an action against the Liverpool underwriters if he thought fit.

3. *BOUSFIELD V. BARNES*. T. T. 1815. N. P. 4 Campb. 228.

Action on a policy of insurance. The defendant's counsel contended that this action could not be maintained, as the plaintiff had already received the full amount of the sum at which the ship was valued by the policy on which the action was brought from other underwriters, and that the plaintiff was estopped from saying that the ship was worth more than 600*l.* *Godsall v. Boldero*, 9 East, 72. was cited.

Lord Ellenborough. I think the valuation in this policy is only conclusive in setting a loss upon it, between the assured and the underwriters who have subscribed to it, without taking into consideration what has been transacted between the assured and the third persons. If a total loss happens, these underwriters shall not pay more than the amount of the valuation; and if there be a partial loss, the valuation regulates the amount of the average contribution. I will, likewise, take care that the assured do not recover upon the whole more than the real value of the subject-matter insured. But I think it is not enough for the underwriters on a particular policy to show that the assured has received from another quarter the amount of the valuation in that policy, unless this amounts in point of fact to a complete indemnity.

4. *REED V. COLE*. T. T. 1764. K. B. 3 Burr. 1512.

This was an action on the case, upon articles of agreement, constituting a society for the mutual assurance of each other's ships, whereby they engaged that when and so often as any of the ships wherein any of the members of this society had property should be lost, the rest should contribute to such loss; but every member was obliged to prove a property of 500*l.* in a ship, and if he would cease to be a member he was obliged to give six months' notice. The plaintiff showed that he had the requisite property in a ship, and became a member, and that the ship was lost. Plea—That the plaintiff had parted with his interest in the ship before the loss happened. Replication—That by articles of agreement with the purchaser of the ship, the plaintiff had agreed to pay 500*l.* if a loss happened within three months; and therefore he was interested during the voyage. But the Court were of opinion, that as he continued contributory to the losses of the others, at the very time when this loss

happened, it was but just and equitable, and within the words and meaning of the agreement, that they should contribute to his. He still had an interest in the safety of the ship; he had not parted with all his interest in it, but continued interested *quoad* this loss.

5. *ANDREE v. FLETCHER*. T. T. 1792. K. B. 2 T. R. 161; 3 id. 266.

Special case, stating that a re-assurance was made by the defendant on a French vessel, first insured by a French underwriter at Marseilles, who was living, and who, at the time of subscribing the policy was solvent. The Court (Ashurst, Buller, and Le Gros, Justices,) were unanimously of opinion that this policy of re-assurance was void; and that every re-assurance in this country, either by British subjects or foreigners, on British or foreign ships, is void by the statute, unless the first assurer shall be insolvent, become bankrupt or die.

6. *DELVES v. BARNES*. M. T. 1807. C. P. 1 Taunt. 48.

The plaintiff delivered to the defendant an account made up from the books of the bankrupt, in which he charged him with premiums of insurance, amounting to 209*l.* 10*s.*, including therein 15*l.* for the premium of 100*l.* insured on goods by the ship *Ann*. The defendant claimed to have allowed to him a counter demand, amounting to 190*l.* 8*s.* 8*d.*, including therein 100*l.* for a total loss on goods by the *Ann*, and paid into court the balance of the plaintiff's claim, being 18*l.* 1*s.* 4*d.* The action was referred, and the arbitrator awarded that the plaintiff should receive the said sum of 18*l.* 1*s.* 4*d.* paid into court, as a full satisfaction of all his demands.

Manfield, C. J. This contract, although it much resembles, yet does not fully amount to, a re-assurance, which consists of a new assurance, effected by a new policy on the same risk which was before insured, in order to indemnify the underwriters from their previous subscription; and both policies are in existence at the same time. But I give no judicial decision whether this would be a legal transaction. The statute, doubtless, was intended to prevent gambling. I suppose the mischief was, that policies were underwritten at one premium, and re-assurances effected at another. There is no recital in the preamble of the statute, which applies to this section; the mere substitution of a different name does not seem to come within the mischief designed to be remedied by that act; and here, if Barnes's name had been struck out, and Bunn's name inserted, with fifteen guineas premium, all would have been right. This is a general submission of all matters in difference. It might have been referred to the arbitrator to decide whether the defendant was legally entitled to set off this sum; but in this case no such restriction is imposed on his authority as there might have been. I admit that, if an arbitrator says, "I meant to make my award according to law, and have misconceived the law;" or, "I have mistaken the fact;" the award shall be set aside; for, in either case, it is not his award that is not his true judgment; but the evidence here does not amount to that case. It was competent for the arbitrator to inform the Court upon what understanding of law or of fact he has decided; but he does not say that, even if he had known this to be an illegal contract, he should have made a different award. He is totally silent, and the ground of his decision is only matter of inference; in some cases it might be capable of demonstration. In a reference of all matters in difference an arbitrator ought to consider not legal only, but also equitable demands; demands of all sorts. How then can I say that he has made this award under a mistaken conception of the law on this subject? Besides, if the arbitrator is not right in the point of strict law, he is certainly right in every other point. The sum of 100*l.* was really due in conscience. The Court ought not to set aside such an award,

* It enacts that it shall not be lawful to make re-assurance, unless the assurer shall be insolvent, become bankrupt, or die; in any of which cases, such assurer, his executors, administrators, or assigns, may make re-assurances to the amount of the sum before by him assured, provided it shall be expressed in the policy to be a re-assurance.

† And in the case of an illegal re-assurance, an action will not lie to recover back the premium after capture; *Andree v. Fletcher*, 3 T. R. 266.

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(B a) RELATIVE TO INSURANCE BROKERS.

And see *post*, *tit.* Lien and Set-off.

(a) Retainer of.

1. *HOOPER v. LIVELY*. T. T. 1814. N. P. 4 Campb. 66.

An order given by a partner on account of the firm of which he is a member, to make insurance on a vessel the property of the partner ship, is binding on the firm;

It was proved that the defendants were members of a commercial company which carried on business under the firm of Garniss, Corden, Burringham, and Co., and that the policies in question were effected in consequence of a letter written by one of the defendants in the name of the firm, ordering an insurance to be done "on account of the company, on two ships, called the Commerce and the Christiana."

Lord Ellenborough. I allow that a one-part owner, even if he be ship's husband, has no implied authority to insure for the others. But I take the distinction to be between part owners and partners. According to the evidence, the defendants carried on business together in partnership, under the firm of Garniss, Corden, Burringham, and Co., and the insurances were ordered in the name and on the account of the firm. Had there been any case holding that the defendants, under these circumstances, were not jointly liable, I should have been very much inclined to overrule it; but there is no authority in point.

2. *FRENCH v. BUCKHOUSE*. E. T. 1771. K. B. 5 Burr. 2727. S. P. *BELL v. HUMPHRIES*. H. T. 1818. N. P. 2 Stark. 346.

But not as with regard to part owners of a vessel or ship.

Two distinct actions of covenant were brought against two part owners of a ship, by the husband of it, who had been appointed to that office by a deed executed by all the joint owners, by which deed they empowered him generally to do and act as husband of the ship as is customary, and to advance or lend, &c., and for all payments made on account of the ship, to retain, &c. He insured the ship, and now brought these actions for the money paid by him for insuring it; it was not a demand of their respective proportions, but a demand from each of the whole sum paid. Both causes stood together for trial; that against Buckhouse came on first. It was then agreed (and so the Court now clearly held) that the husband had no right to insure for any part owner, without his particular direction; nor for all the owners in general, without their general direction or something equivalent to it. In the present case it was not pretended that he had received any express general direction from all the owners; but it was insisted, on the part of the plaintiff, that they were informed of it, and acquiesced in it; and the plaintiff's counsel called a witness to prove this. The defendants' counsel denied it, and insisted that they were never informed of it before the bringing of the action; and this they offered to prove by calling Mr. Foulston, the defendant in the second cause. The plaintiff's counsel objected to his competency. The defendants' counsel answered, and insisted that there was no objection to his competency, whatever there might be to the degree of credit to be given to his testimony. Lord Mansfield held him an incompetent witness, and rejected his testimony upon that fact. A verdict was given for the plaintiff.

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Lord Mansfield. It is most usual for all the owners to direct the husband of the ship to act discretionally for them all; but this is not his office to do without particular directions. Here a general direction came within the terms of the deed; and the husband did insure for all the owners. There is a strong probability that he had a general direction. Indeed, the evidence brought to prove that there was a general direction given by all the owners was, not that they gave an express direction; it only proved, that they were told of the insurance and expressed no objection to it. Unless there was a general direction the plaintiff could not recover in this action. This is an action for the whole of the insurance money. The other part owners cannot be liable to contribution in this action, unless there was a direction to insure, given by them all. This case comes within the reason of an action brought against one partner who can come against his co-partner for a contribution.

Mr. Justice Aston concurred, that the verdict against one of these joint owners would affect the other of them, because that other would be obliged to contribute. Mr. Justice Willes was likewise clear in opinion that, as the point to be left to the jury was, whether the other joint owners, being informed of the insurance and acquiescing in it, was sufficient evidence of their directing it; this other joint owner could not be called as a witness to disprove it, because his giving such evidence would tend to discharge himself.

Mr. Justice Ashhurst also held, that the plaintiff (notwithstanding the general power given him by the deed to act as husband of the ship) had no authority to insure it, without either a general direction from all the part owners, or a particular direction from each. Here he goes upon a general direction from all; and he would prove this by showing that they all knew of his having insured, and acquiesced in it. The other joint owner, the defendant in the second action, is called to disprove this. But it is to be observed that these actions are brought, not against each defendant for his proportion of the insurance money, but against each, for the whole of it; in which case it is an objection, and is like the case of an action brought against one partner for the whole debt due from the copartnership. There is no foundation, therefore, for granting a new trial.

3. *LUCENA V. CRAUFORD*. M. T. 1816. C. P. 2 N. R. 297.

Per Cur. Commissioners appointed for the management and disposal of ships delivered at sea, in the event of their arrival in this country, may insure.

4. *ROBERTSON V. HAMILTON*. M. T. 1811. K. B. 14 East, 522.

The ship *Ross*, belonging to the plaintiffs, and the ship *Atlantic* (on which this question arose) belonging to Fisher and Co., and the cargoes to other persons, were insured on a former voyage, and captured by the Spaniards and carried into Spain; and the underwriters upon the *Atlantic*, of whom the defendant was one, paid as for a total loss. But while proceedings for condemnation were pending in the Prize Court in Spain, Cawan (residing there), having been severally empowered by the different owners to claim restitution, and to enter into compromise with the captors for giving up part of the cargoes on the restitution of the remainder and of the ships, and to defray all costs and charges thereon, and to forward the ships and goods restored to London, and to pay all demands on the ships and goods, agreed with the captors, subsequent to the cessation of hostilities (and the captures and subsequent peace were held in the Court of Admiralty, to bind the property captured), that upon giving up to them part of each cargo, the rest and the ships should be restored for the common benefit of the original owners of both ships and cargoes in the lump. On which, Cawan advised the plaintiffs that he should consign the *Atlantic* to them with their own ship the *Ross*, and draw bills on them (which were afterwards accepted and paid) for the general expenses of effecting the arrangement with the captors, and for the outfit of both ships, and referred to this information to guide them with respect to insurance; on which the plaintiffs insured the *Atlantic* by a policy on ship, or on salvage charges, or on any interest as might be thereafter declared by the assured; and after a subsequent capture of her by the French, declared against the defendant (who had also underwritten this second policy), and averred the interest to be, first, in themselves, and secondly, in Fisher and Co., the original owners of the ship *Atlantic*. Held, that the plaintiffs had an insurable interest, as well on account of the whole property captured (of which they owned the other ship *Ross*) having been restored at the sacrifice of part of the cargoes, for the common benefit of all, which created in them a hotchpot interest in the ship *Atlantic*; and also as representing Cawan, who was empowered to act as attorney for all the original owners, and to whom such restitution in hotchpot was made for their common benefit, and who had incurred charges and drawn bills on the plaintiffs on account of the common concern, which had been accepted and paid by them; and Cawan having had authority to insure from Fisher and Co., the original owners, under their order, on obtaining restitution, to forward the ship to London, and to pay all claims and demands on her,

Commissioners appointed for the management and disposal of ships delivered at sea, in the event of their arrival in this country, may insure; [522] And persons authorized to prosecute a claim upon a vessel in a prize court a broad, to forward the ship to London, and to pay all demands upon her, have been considered as clothed with power to effect insurance on the property entrusted to their management.

though the plaintiffs would be amenable out of the money recovered to the several persons interested, in proportion to their several claims on the property in hotchpot and amongst others to the defendant himself, as an underwriter on the first policy, upon which he had paid as for a total loss to Fisher and Co.

5. *ROUTH v. THOMPSON*. H. T. 1811. K. B. 13 East, 274.

Where an insurance is made by a captain (himself having no insurable interest), as agent, any declaration as to the party interested must be taken as binding, and may be adopted by the crown.

After an order made by the King in council on the 2nd, and gazetted on the 5th of September, 1807, to detain and bring into port all Danish vessels, a hired armed ship of his Majesty took, off Lisbon on the 10th, and carried in thither, a Danish vessel; and without instituting any proceeding in the Admiralty Court there, though Portugal was an ally with England in the war, sold her cargo to defray the expense of repairs, and took in a loading on freight for London, with which she sailed on the 3rd of November, on which day hostilities were declared against Denmark by another order of council; and on the 12th of November an insurance was made by order of the prize-agent appointed by the captors, in consequence of a letter written by him in October, before the declaration of hostilities, directing the plaintiff to insure "for my account the Danish vessel Knud Jenhelson, which has been detained by his Majesty's armed ship Duchess of Bedford, and for which I am authorized to act as agent," and concluding with expressing the agent's confidence that the plaintiff would do the best for the interest of the concerned; and after such assurance was effected, the King, by another order of council, recited the circumstances, and adopted the insurance. Held, that his Majesty having a lawful possession of the captured vessel, through the act of his officers and servants, whose possession was legalized by the previous order to detain Danish vessels, whether known to them or not at the time of the capture, had an insurable interest therein; and that it was competent for him to adopt the insurance made by order of the agent appointed by the captors, whose letter of instruction to insure for his account was sent in his general character of agent for the capturing ship, and permitted by the terms of it an insurance to be effected for the benefit of any who might ultimately appear to be interested, and none other but his Majesty had an interest in the vessel seized, before the declaration of hostilities and order for reprisals.

6. *HAGEDORN v. OLIVERSON*. E. T. 1814. K. B. 2 M. & S. 485.

If one man makes a contract expressly for another, though the one be not the other's agent, express or implied (implied, as where he is his general agent), the latter may adopt the contract.

Plaintiff effected an insurance on ship, as well in his own name as for and in the name of all and every other person, &c. in the usual form, for the benefit of S, an alien enemy, and procured a licence to legalize the voyage, and a loss happened; and two years afterwards S, by letter to the plaintiff, adopted the insurance.

Per Cur. We think this is a case in which the defendant ought to pay, and the plaintiff ought to receive, for a loss under the policy. A loss has happened, upon which the defendant undertook to pay; and if the premium could not have been recovered back from the defendant, there is not any circumstance here which should exonerate him from liability. We think the plaintiff never could have recovered back the premium from the underwriter, because of the uncertainty whether Schroeder would adopt the assurance in respect of which the underwriter would have incurred the risk. While the contract was in *feri* there was not any disposition on the plaintiff's part to have the policy vacated, and, if there had been, it would have been an answer to him, that Schroeder might have adopted it. Then comes the question, whether Schroeder is entitled to take the benefit of this insurance? It is stated that it was effected for his benefit; therefore it was intended to cover his specific interest at the time. Schroeder had an interest at the time, and although there was not any specific communication at the time, yet as Schroeder was connected in the concern, it was reasonable for the plaintiff to expect that Schroeder would adopt an act which could be done with no other view than for his benefit. Schroeder must be considered as under a moral if not a legal obligation to adopt it, although the ship arrived. Being under that obligation in all events, he thinks that he is warranted in adopting it even after a loss, and has adopted it. The case of *Routh v. Thompson* shows, that if a policy

be effected with reference to the benefit of a person interested, an adoption [524] of it by such person after the loss will be sufficient.

7. MOONE v. HENDERSON. H. T. 1801: K. B. 1 East, 335.

An English subject in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time that the property was neutral. At the trial by the direction of Lord Kenyon, a verdict was found for the plaintiff for the amount of the average loss, deducting the amount of the premium upon this policy. A rule nisi having been obtained, for setting aside the verdict and granting a new trial, on the ground of a misdirection in this respect,

Lord Kenyon, C. J., said that he remained of the same opinion as at the trial. If the agent disclose his principal at the time, it is clear that he cannot pledge the property of such principal to another with whom he is dealing for his own private debt. It is true that he did not name him at the time, but he did in effect the same thing, by saying it was for a neutral. Supposing the agent had said to the defendants, "It is true, I am agent for a foreigner, but nevertheless you may retain the money due to him for my debt;" could such a transaction be sustained? But that which is now contended for is in effect the same thing. All, therefore, that the defendants can retain for is the amount of the premiums due on this policy on the part of the plaintiff.—Rule discharged.

(b) Duties of.

1. SMITH v. LASCELLES M. T. 1788. K. B. 2 T. R. 189. S. P. CORBET v. GORDON. M. T. 1818. N. P. 3 Campb. 472.

Case for neglecting to make an insurance on the freight of goods, shipped on board the General Melville, from Dominica to London. It appeared at the trial, that the plaintiff being indebted to the defendant in 850*l.*, in February, 1785, mortgaged to him his interest in the goods and freight by way of security; in which mortgage was contained a proviso, that the deed should be void in case of payment in August, 1785. In July, 1785, the plaintiff, in a letter inclosing the bills of lading, desired the defendant to procure an insurance on the goods and freight, which letter could not have been received before the mortgage became obsolete. The defendant did cause insurance to be made on the goods, though not on the freight. At the trial proof was given of a letter having been received by the defendant from the plaintiff; but it did not appear whether it was the letter in question. Three grounds were now made for a new trial: 1st. That it had not been satisfactorily proved that any order to insure had been received. 2ndly. That, supposing the letter to have been received, the plaintiff had no insurable interest, the defendant having insured the goods on his own account, and the mortgage at the time being forfeited. 3rdly. That if the plaintiff had an insurable interest, the defendant was not bound to obey the plaintiff's directions to insure; so far from the defendant having money of the plaintiff's in his hands, the latter was actually indebted to him, and therefore he could not be compelled to give him a longer credit. *Per Cur.* This is not the first question of the kind that has come before us at Guildhall. In a case which arose near two years ago, we stated very fully to the jury the law respecting the obligation under which a merchant residing in this country is to insure for his correspondent abroad, which was repeated in a great measure in this case. It is now settled as clear law, that there are three instances in which such an order to insure must be obeyed: 1st. Where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent; yet, if the course of dealing between them be such, that the one has been used to send orders for

* The authority of a broker employed to effect a policy of insurance may be revoked after the underwriters have signed the slip, till such time as they actually subscribe the policy; see *Warwick v. Slade*, 3 Campb. 127.

insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. 3rdly. If the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading will be accepted, which the other must obey if he accept them, for it is one entire transaction. It is true, as it has been observed, that unless something has been held out by the person here to induce the other to think that he will procure insurance, he shall not be compelled to insure. But if the commission from the merchant abroad consist of two parts, the one to accept the bill of lading, the other to cause an insurance to be made, the correspondent here cannot accept it in part and reject it as to the rest. If such be the law on this subject, the fact in this case is clear; for with regard to the letter, there is no pretence for saying that any other was received by the defendant from the plaintiff but that containing the order of insurance; and the jury have so found it.

2. *WILKINSON v. COVERDALE*. M. T. 1793. N. P. 1 Esp. 75. S. P. *WALLACE v. TELFORD*. M. T. 1793. N. P. Id. 76. *ELLICE v. GALWOOD*. H. T. 1793. K. B. 5 T. R., 143.

And when a person, though without consideration, undertakes to procure an insurance, [526] if he proceed to carry the measure into execution, he will be liable for an injury occasioned by his negligence or unskilfulness.*

Case. The declaration stated that the defendant had undertaken to procure an insurance against fire for certain premises belonging to the plaintiff, and on his account, which insurance he had effected; but that he had conducted himself so negligently in the perfecting of such insurance, that, the premises having been burned by fire, the plaintiff had not been able to recover any part thereof against the fire-office, whereby he had suffered a total loss. For the plaintiff a manuscript note of a case at Nisi Prius (before Mr. Justice Buller) of *Wallace v. Telford*, was cited, wherein that judge had ruled, in an action similar in point of circumstances with the present, that though there was no consideration for one party's undertaking to procure an insurance for another, yet where a party voluntarily undertook to do it, and proceeded to carry his undertaking into effect by getting a policy underwritten, but did it so negligently or unskilfully that the party could derive no benefit from it, that in that case he should be liable to an action. Counsel then contended that the defendant in the present case had brought himself within the rules so laid down by the learned judge, he having effected the policy, but by his negligence in procuring the allowance at the fire-office on the assignment of the premises, the plaintiff had lost all benefit from it. Lord Kenyon acquiesced in the distinction, and suffered the cause to proceed. The plaintiff, however, failed in proving any promise of the defendant to procure the insurance as stated in the declaration, and was nonsuited.

3. *MOORE v. MOURGNE*. M. T. 1776. K. B. Cowp. 479. S. P. *COMBER v. ANDERSON*. M. T. 1808. K. B. 1 Campb. 525.

When no particular directions are given as to the manner in which the insurance is to be made, the agent will be protected in the exercise of his discretion, provided he acts bona fide to the best of his judgment.

This was an action brought by the plaintiff, who was a merchant of Alicant, against the defendant, his agent in London, for misbehaviour in not insuring the plaintiff's goods agreeable to directions. The goods were a cargo of fruit, and by the letters produced in evidence it did not appear that the plaintiff had given the defendant any particular directions how or with whom to insure, but only generally to insure the cargo. The defendant insured with the London Insurance Office, who, in policies upon fruit, always put in an exception free from particular average. This policy was made, therefore, with that exception. The loss was not entirely a total loss; for though the goods were at first under water, some were saved; but those that were damaged would not pay the salvage of them. The jury found a verdict for the defendant; and one of them said the ground of their verdict was, because they thought he acted bona fide to the best of his judgment.

Lord Mansfield. The drawer of this declaration has thought it necessary to invent two grounds of action on which to found the plaintiff's claim: 1st.

* A broker who employs another, but omits to give all the instructions he is furnished with, is answerable for the loss occasioned by his omission, although he derived no profit from the transaction; 1 Marsh. Ins. 315.

That the plaintiff had given orders to insure free of average, except general or the ship stranded, and that the defendant had undertaken to do so. The next ground is, that he had given orders to insure in the usual and customary course. These two grounds are entirely a fiction; for there were no such orders given, and no such express undertaking; and to maintain this action, the defendant must be guilty either of a breach of order, gross negligence, or fraud. Now all the observations which have been made to-day were made at the trial, and were very proper for the consideration of the jury; and my directions to the jury were general; and if they thought there was gross negligence, or the defendant had acted *mala fide*, they should find for the plaintiff. If, on the contrary, they were of opinion that he had acted *bona fide* and to the best of his judgment, then they should find for the defendant. In delivering their verdict, they say they did not think the defendant guilty of gross negligence, or that he acted *mala fide*. The Court, therefore will not say so. The plaintiff if he pleased might have given orders to the defendant not to insure at the London Insurance Office, but at some other office where this exception would not have been insisted on. But he gives no direction at all. Therefore he left it to the discretion of his correspondent, who, if he meant no fraud, was at liberty to elect between the underwriters. It seems the Exchange Assurance Office and the London Insurance Office differ in the form of their policies; but though the one runs a risk which the other does not, the premium is the same. There could be no temptation, therefore, to the defendant as to the choice between them. If upon all these circumstances the jury had found for the plaintiff, it might have been a cast whether the Court would have granted a new trial. But clearly they will not where no particular orders are given, and where the defendant appears to have acted *bona fide*, and where the plaintiff himself has been guilty of the first omission, in not giving proper directions. There seems to be no ground at all for the Court to interpose against the defendant. The three other judges concurred.—Rule for a new trial discharged. [527]

4. TOSHER V. SCOTT. T. T. 1815. C. P. 6 Taunt. 234; S. C. 1 Marsh, 556.

A., the captain of a ship, having incurred expenses on her account, draws a bill on his owner in payment, with a memorandum that if it should not be honoured, the holder would insure the amount, and place the premium, &c., to the ship's and A.'s account. The bill is indorsed to B., and by him presented for acceptance, but dishonoured; and B. then effected an insurance for three months, the interest being declared to be on the bill. In an action by B. against A. for the premium and expenses, there were two objections: 1st. That this was an illegal insurance, and not available against the underwriters, being an insurance without interest, and prohibited by stat. 19 Geo. 2. c. 37; and, therefore, the premium could not be recovered back. 2ndly. It was objected, that the insurance should have been on the ship, and not on the bill; and on the voyage, instead of for three months; because the owners would have no benefit from the insurance in the form in which it was effected. The holder of a bill of exchange, which contained a memorandum that if it was not honoured, the holder might insure the amount and place the premium to the account of a particular vessel and of the drawer, who was the master thereof, the bill being drawn for supplies, were held on to have executed the direction with propriety in insuring for three months.

Per Cur. We cannot say that, on further consideration, we think there is any weight in either of these objections. As to the insurance being for a time and not on the whole voyage, there was no particular insurance prescribed, but it was left to the discretion of the holders of the bill; and if they have exercised that discretion honestly, we see nothing to control it. With respect to the illegality of the insurance, as to which we desire that our opinion may be considered as confined to this particular case, the insured had this interest in the arrival of the ship, that by such arrival his debtors would have more ample means of paying the amount of the bill. It was on the authority given by the bill, and by the direction of the captain, that the insurance was effected; and the plaintiffs having previously advanced this money for the use of the captain, we think they are entitled to recover it back. In many cases this would be an available security, indeed in all cases but that of British vessels, and we see no necessity for inquiring whether this were a British ship or not.

5. *TODD v. REID*. H. T. 1811. K. B. 4 B. & A. 210; S. C. 3 Stark. 16.
S. P. *RUSSEL v. BINGLEY*. M. T. 1811. K. B. 4 B. & A. 395.

An insurance broker is only entitled to recover payment for the assured from the underwriters in money, and a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss is illegal.

The assured had employed one Power, a broker, to effect the policy, which he returned to the assured. Some time after the loss happened, the assured sent the policy to him for the purpose of adjusting the loss, and receiving from the underwriters the amount of their several subscriptions. The policy was adjusted by the defendant; and part of the sum for which he had subscribed the policy was duly paid over to the plaintiff. At the time of settling the loss the broker was indebted to the underwriters for premiums on other policies of insurance, but to which the plaintiff was not a party, in a sum equal to the residue of the money due on the policy in question; and this sum was allowed in account between the broker and the underwriters; and it was contended that this was to be considered as payment to the assured to that amount. It was proved at the trial, that it had been the practice at Lloyd's coffee-house for many years thus to settle losses between the broker and the underwriter. Abbott, Chief Justice, was of opinion that such a usage could not be supported by law; that the broker had only authority to receive payment in money from the underwriters; and the plaintiff recovered a verdict.

Per Cur. The broker, as agent of the assured, was only entitled to receive payment in money; and no usage can sanction such a practice as that which is stated to have prevailed in this particular business. This is, in fact, an attempt to pay the debt of one person with the money of another.

6. *WAIT v. ATTY.* T. T. 1812. C. P. 4 Taunt. 493.

A broker, in pursuance of instructions previously received from T., effected a policy at Lloyd's at a time when a letter lay on his table at the coal exchange opened an [529] nouncing the loss of the vessel; held that the jury were warranted in finding this no want of diligence as to avoid the policy.

This was an action upon a policy of insurance, upon the ship *Monarch* and freight, at and from Malta to Gibraltar and Lisbon, to return four per cent. for convoy from thence to Lisbon, and twelve per cent. for such proportion of the freight as was due for the cargo discharged at Gibraltar, and twelve per cent. if the voyage terminated at Gibraltar. It appeared by a letter from the master of the vessel, which had laid some time at Malta waiting for freight, that he had at length chartered her for this voyage to sail without convoy; the owner knew this at the time when he gave instructions for the policy; but it also appeared by the same letter, that it was not known when any convoy would be appointed. The vessel had no licence to sail without convoy; and counsel contended, that the charter-party was therefore illegal, and that, although the owner was not instrumental to the sailing without convoy, yet that as he was afterwards aware of the fact of her having sailed without convoy, before he gave the instructions for the policy, that was such a privity as rendered the insurance void; the jury found a verdict for the plaintiff.

Per Cur. With respect to the convoy, we have not the slightest doubt that the statute did not intend to affect the policies of any who are not privy to the sailing without convoy. The eighth section of the 43 Geo. 3. s. 57. excepts all vessels sailing from foreign ports where no convoy is appointed or to grant licences. It does not appear in this case either that any convoy was appointed from Malta, or that there was any person there authorized by the Admiralty to grant licence to sail without convoy; unless this, therefore, were shown in the cause, it is not shown that the master acted illegally in sailing thence without convoy.

7. *BOUSFIELD v. CRESWELL*. M. T. 1810. N. P. 2 Cambp. 545.

If an insurance broker keeps a policy he has effected in his hands he is bound to use reasonable diligence to procure the underwriters to settle and pay any loss that may happen upon it.

Action against an insurance broker, for his not having duly called upon certain of the underwriters, who have since become insolvent, to settle the loss, and pay the sums insured by them. Lord Ellenborough. If an insurance broker keeps the policy in his hands he shall be presumed to promise that he will collect the sums due from the underwriters upon a loss happening, in consideration of the commission he receives for effecting the insurance.

he is bound to use reasonable diligence to procure the underwriters to settle and pay any loss that may happen upon it.

(c) *Rights of.*

From the nature of the as

1. *DALZELL v. MAIS*. M. T. 1808. N. P. 1 Cambp. 534. S. P. *AMY v. BLOMP.* T. T. 1800. K. B. Park, Ins. 36; Marsh. Ins. 294.

The defendant had underwritten a policy effected by one Reid. an insurance

broker, on account of the plaintiff, upon goods by ship or ships, at and from Berbice to Great Britain. This action was brought to recover back the premium, on the ground that the goods had never been shipped. The plaintiff gave in evidence the policy signed by the defendant, which contained the usual acknowledgment on the part of the underwriters, "confessing ourselves that the lat-
ter, before he has ac-
tually paid the premi-
ums to the underwri-
ters, may maintain an
action a-
gainst the insured to
recover the amount of
[530]

Lord Ellenborough. The defendant is bound by the receipt in the policy. If a man acknowledges that he has received a sum of money from a broker, and accredits him with his principal to that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him. I should completely knock up the insurance business, if I were to allow this acknowledgment to be impeached. It is well known that there are running accounts kept between the insurance broker and the underwriter; and Lord Kenyon held that the former, before paying the premiums to the latter, might maintain an action against the assured, to recover the amount of them as for money paid

2. *EDGAR v. BARNSTEAD*. T. T. 1808. N. P. 1 Cambp. 441.

The plaintiff being an insurance broker, got a policy underwritten for the defendant, a merchant, on the ship *Alfred*, which was subscribed (amongst others) by one Lomas. A loss happened, whereupon the plaintiff paid the full amount of the sum insured to the defendant. Previously to this Lomas had become insolvent, without the plaintiff being aware of that fact; and it was now contended, that he had a right to recover the sum he had paid to the defendant in respect of Lomas's subscription, as money paid under a mistake of fact. But Lord Ellenborough held, that on account of the well known course of dealing between the insurance broker, the merchant, and the underwriter, the money could not, under these circumstances, be recovered back from the assured.

3. *JAMESON v. SWAINSTON*. M. T. 1810. N. P. 2 Cambp. 546.

The plaintiffs were insurance brokers, residing at Leith, in Scotland; and had, by orders of the defendant, who lived at Liverpool, effected for him certain policies of insurance with different underwriters at Leith, upon the defendant's ship, bound on a voyage from Liverpool to the Baltic. In the course of the voyage, the ship was stranded in the Orkneys, and the plaintiffs advanced considerable sums of money in refitting the ship, and preparing her for the remainder of the voyage. Afterwards an average loss was adjusted of sixty-eight per cent., and the plaintiffs, upon that adjustment, in the month of May, 1806, transmitted an account from Leith to the defendant at Liverpool debiting him with their advances, and giving him in return credit for the amount of the average loss due from the underwriters in Leith. The balance of the account so rendered was in favour of the plaintiffs 170*l.*, which the defendant immediately paid. In the month of August, which was the usual time at Leith of settling between the brokers and underwriters, the plaintiffs called upon the underwriters for the amount of the average loss; some of them paid, others refused upon the ground of insolvency. The sum which was not received amounted to 325*l.*, and was the subject of the present action. Different applications were made by the plaintiffs to the underwriters for payment, but without effect. Afterwards, in August, 1808, the plaintiffs transmitted another account to the defendant, in which they claimed to be due to themselves the sum of 325*l.* by reason of their not being able to receive it from the underwriters.

Mansfield, C. J. said, that without resorting to usage, which might be different at Leith and London, he was of opinion that, after so great a lapse of time between the rendering of the two accounts, the brokers as betwixt themselves and their principal, must be presumed either to have received actual payment of the average loss from all the underwriters, or to have settled with them in account some way or other. For the purpose of recovering from the defendant, they should have apprised him in August, 1806, of the state of the underwriters, who he was naturally led to suppose had settled with the brokers, and their silence had deprived him, for the space of two years, of all op-

[531] opportunity of enforcing the policies of assurance. The brokers' laches was an answer to their demand against their principal, and they must look to the underwriters, whom they had trusted.—Verdict for the defendant.

4. STACKPOLE v. EARLE. E. T. 1761. K. B. 2 Wils. 133. S. P. EX PARTE MATHER. S. P. 3 Ves. Jun. 373.

Nor can he recover expenses incurred in effecting an illegal insurance;* This was an action on a policy of insurance for 160*l.* at four guineas per cent., in case Drury Sheppey should die at any time between the 1st of April, 1777, and the 1st of April, 1778, both days included, and during the lifetime of John Sheppey, the father of Drury; but in case the said John should die before the said Drury, the policy to be void. The question was as to the representation of the life at the time of the insurance. The interest in the insurance was 903*l.*, due from Drury Sheppey to the plaintiff. It was admitted that the life expired within the time limited in the policy. Drury Sheppey had a place in the Custom House of Ireland, and was in bad circumstances. He went to the South of France for the benefit of his health, or to avoid his creditors, and there died. The broker who effected the policy told the underwriter that the gentleman for whom he acted would not warrant, but from the account he, the broker, had received he believed it to be a good life.

Lord Mansfield. As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. Where there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of the knowledge of the state of the life it is a fraud. It is a rule that every subsequent underwriter give credit to the representation made to the first; and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own, but speaks from information. There is no fraud in him. There was a verdict for the plaintiff. Even where there is an express warranty that the person is in good health; it is sufficient that he is in a reasonable good state of health: for it never can mean that the *cestui que vie* is perfectly free from the seeds of disorder. Nay even if the person whose life was insured laboured under a particular infirmity, if it can be proved, by medical men, that it did not at all, in their judgment, contribute to his death, the warranty of health has been fully complied with, and the insurer is liable.

5. RODERICK v. HIVILL. M. T. 1811. N. P. 3 Campb. 103.

Or recover for premiums or charges incurred with reference to the effecting of an stamped policies. In a former action for the same cause, it appeared that the policy had not the proper stamp, and the plaintiff was nonsuited. Since then the commissioners of stamps had permitted the proper stamp to be affixed to the payment of a penalty. It was for the defendant insisted that the commissioners had no power to do so, and that the instrument was still a nullity. The counsel relied upon 35 Geo. 3. c. 63. s. 16. Lord Ellenborough said the statute was imperative upon him; and that as the policy was not only stamped before it was effected, the broker could not recover any thing for effecting it.

6. SHEE v. CLARKSON. T. T. 1810. K. B. 12 East, 567.

Whilst the agency of the broker subsists in the usual manner, the underwriter cannot recover from him the premium, with out allowing for returns, to which by e The plaintiff, in 1808, had subscribed policies of insurance, which the defendants had effected as brokers, the premiums upon which amounted to 559*l.* 10*s.*, and had also settled and signed, upon policies subscribed by him for them, adjustments for returns of premiums amounting to 18*l.* leaving a balance due to the plaintiff of 511*l.* 10*s.*, for which this action was brought. The defendants insist that they are entitled to deduct or retain out of that sum, the sum 205*l.* 19*s.* 6*d.* being the amount of deductions for short interests and stipulated returns of premiums for convoy upon the same policies for the premiums on which this action was brought, and which policies had always remained in the defendants' hands, and had not been handed over to their principals. There was no evidence that the defendants had received the premiums from their principals, nor was there any evidence that the defendants had credited their principals with returns of premium for convoy and short interest claimed by them. The plaintiffs had allowed the defendants an

* Or prove a debt so contaminated under a commission of bankruptcy; see 3 Ves. 673; 6 Taunt. 233; 1 Marsh. 650.

account of all the returns on policies upon ships and goods upon which they were personally interested, and also all the returns on policies which have been adjusted: and the set-off or deduction claimed of 200*l.* 19*s.* 6*d.* in dispute arises upon policies subscribed by the plaintiff, which the defendants have effected as brokers for others. The defendants did not act under any *del credere* agency or commission. The events entitling the return claimed had happened before the commencement of the present action; but it was not admitted by the plaintiff that the defendants were thereby entitled to deduct or set off the returns claimed; that being the question for the opinion of the Court. The plaintiffs insisted that, upon the events happening, the principals, and not the brokers, were entitled to the returns claimed, unless such returns were adjusted by the underwriters with the brokers; and the defendants insisted that, upon the events happening without any adjustment, or *del credere* commission, they as brokers were entitled to returns as abatements out of premiums. The question was, whether the defendants were entitled to deduct or set off the sum of 205*l.* 17*s.* 6*d.*? If not, the verdict was to stand for that amount; if they were so entitled, a verdict was to be entered for the defendants.

Per Cur. The underwriters suffer the full premium to remain in the hands of the broker, who is the agent also of the assured, and in the mean time the event happens, which reduces the underwriters' claim in respect to the premium to a less sum than it was at first; it is then the justice of the case, and the law of the case also; the broker should pay over to him only such as remains due at the time. The broker is the agent for the assured, who has a right to give him notice not to pay over to the underwriters more than his due.—*Postea* to the defendants.

[533]

(d) Liabilities of.

1. WEBSTER v. DE TASTET. H. T. 1797. K. B. 7 T. R. 157. S. P. JOINER v. OSWELL. H. T. 1813. K. B. 3 Cambp. 357.

The plaintiff having been hired to go as a mate in a ship from the coast of Africa to the Havannah, for which he was to receive wages at the rate of 5*l.* per month, and three privileged slaves, free of expence, on the ship's arriving at the port of sale, directed the defendant, who was his agent at Liverpool, to get an insurance on his privilege; and for the defendant's neglect the plaintiff brought this action on the case against him. It appeared at the trial at the last Lancaster assizes before Justice Lawrence, that the ship was lost on her voyage, and that the plaintiff thereby sustained a loss of 150*l.*, reckoning 39*l.* 5*s.* for his detained clothes, and the rest for the value of the slaves. It was objected on behalf of the defendant, that the plaintiff could not recover the value of the slaves, because they were not the legal subject of insurance, they being in the nature of seamen's wages. That point was reserved for the opinion of the Court, a verdict being taken for the plaintiff for 150*l.*, with liberty to the defendant to move to reduce the damages to 39*l.* 5*s.* The Court were clearly of opinion that the slaves were not the subject of insurance, and that the plaintiff could not recover in this action more than he could have recovered in an action against the underwriters; they therefore made the rule absolute to reduce the damages to 39*l.* 5*s.*—Rule absolute.

2. PARK v. HAMMOND. H. T. 1816. C. P. 6 Taunt. 495; S. C. 2 Marsh. 189; S. C. Holt, 86. 4 Cambp-344.

The plaintiff proved a letter dated from Malaga, instructing the defendant to insure 1,000*l.* upon goods shipped on board the Pearl, from Gibraltar to Dublin; that the plaintiff took the risk on himself from that place to Gibraltar Bay, where he should send his letters on shore. The vessel sailed with the goods on board from Malaga, and in her course hove to in Gibraltar Bay and sent her letters on shore by a boat from Algesiras, and did not touch at Gibraltar, but on the same day proceeded on her voyage, and was lost by striking on a rock.

* A broker is not entitled, upon the ground of any usage of trade, to a commission of twelve per cent on the balances which he pays over to the underwriters who employ him; such allowance is merely a gratuity; see *Levi v. Baines*, Holt, 412.

The defendant had effected an insurance on goods by the Pearl, at and from Gibraltar to Dublin, beginning the adventure from the loading thereof on board at Gibraltar; the underwriters not being upon this policy liable to make good the loss of merchandize shipped on board at Malaga, refused to pay; and in action brought thereon, the plaintiff was nonsuited on this objection.

[534] *Per Cur.* This point having been settled ever since *Robinson v. French*, and down to a late cause in *Maule and Selwyn*, that an insurance, to commence from the loading of goods at a certain point, will not attach on goods previously laden; no person who undertakes to insure for others should be ignorant of it. It is of very great moment that those who undertake such important business as this for others who are abroad, should be acquainted with the proper mode of transacting it; and if they undertake it without such knowledge they are liable to the assured for the consequences.

3. *WILHAVEN v. CLAY*. E. T. 1815. C. P. 6 Taunt. 110. *VAUGHAN v. BELL*. E. T. 1812. K. B. 3 Campb. 237. *BARKER v. LANGHORNE*. H. T. 1816. K. B. 4 Id. 399, *contra*.

An insurance broker, who debits an underwriter with a loss, and takes his acceptance for a protracted payment of the balance of account between them is liable to the assured for money had and received.*

When an insurance is discovered to be void, from the broker having suppressed a material communication, the assured is not bound in favour of the broker, or responsible

[535] to him for the consequences, to resist re-funding subscriptions paid to him by underwriters, under a mistaken supposition of liability.

The defendants were insurance brokers, and had effected for Gwynne, who had since become a bankrupt, a policy on the ship *Harriet*, which Aguilar, an underwriter, had subscribed for 500*l.*, and had adjusted a total loss thereon; he had not paid the money to the defendants, and his name, though struck off the policy, still remained on the adjustment; but in an account which was current between him and the defendants the defendants had debited him with the amount of this loss, and had with Gwynne's knowledge, drawn a bill at three months' date, payable to their own order, for 419*l.*, being the general balance due to them upon their own account with him, in which account this debt of 500*l.* was included. The usual period for payment of a loss on a policy is one month after adjustment. Aguilar having become a bankrupt, this bill was not paid, and the defendants proved the then balance of their account, 308*l.* 3*s.*, under his commission, and received a dividend thereon, which they paid over to the plaintiffs, who now brought this action for the residue. The jury found a verdict for the plaintiffs. The Court held that inasmuch as there was a loss settled with the underwriter, and a bill of exchange at three months' date accepted for the balance, at a time when the assured was entitled to immediate payment, which was at a month, the defendants thereby tied up Gwynne's hands, which they had no right to do.

4. *MOYDEN v. FORESTER*. T. T. 1814. C. P. 5 Taunt. 615

This was an action against the defendants, who were insurance brokers, for not having communicated to the underwriters, at the time when they effected several policies for the plaintiffs, certain letters which were unquestionably material, by reason of which omission the plaintiffs having sustained losses to the amount of 18,000*l.*, failed in two actions on the policies, and incurred costs to the amount of 2,400*l.* more. The plaintiffs had since offered to the defendants the permission to try as many more causes as they thought fit, which they declined. The plaintiffs afterwards refunded to certain underwriters, who had paid the losses without being sued, the sums so paid, without offering the defendants the option of insisting on the plaintiffs' right to retain the money so paid. It was moved to set aside the verdict and have a new trial, on the grounds: 1st. As to materiality of the letters. 2ndly. That the defendants ought not to be charged with this money, which had been voluntarily refunded, unless it were shown that the underwriters could, after a spontaneous payment have recovered it back. But the Court held that it was impossible, in any point of view, to find fault with the verdict, and discharged the rule.

* Where a person employed by shipowners, or their agent, effects a policy of insurance, and represents himself as the principal broker, who cause such assurance to be effected, held, that if the brokers receive the amount of the loss from the underwriters and pay it over to the agent, they are not liable to the owners in an action for money had and received; see *Bell v. Jutting*, 1 Moore, 153.

5. *HIND V. ELLIOTT*. E. T. 1797. C. P. 3 B. & P. 3. S. P. *FARMER V. RUSSELL*. M. T. 1796. C. P. 2 Id. 296.; S. P. *DIXON V. HAMMOND*. H. T. 1819. K. B. 2 B. & A. 310. *ANDREWS V. ROBINSON*. H. T. 1812. K. B. 3 Campb. 199. *WILKINSON V. CLAY*. E. T. 1814. C. P. 6 Taunt. 110.

The defendant being a broker, effected an insurance for the plaintiff, a British subject, on goods from Ostend to the East Indies, on board the *Koenitz*, an imperial ship. The ship being lost, the underwriters paid the amount of the insurance to the defendant, who, without any intimation from them to retain the money, refused to pay it over to the plaintiff.

Buller, C. J. Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the defendant then, in conscience, keep the money so paid? For what purpose should he retain it? To whom is he to pay it over? and who is entitled to it but the plaintiff?

6. *ROBERTS V. OGILBY*. E. T. 1821. Ex. 9 Price, 269.

This was an action of *assumpsit* for money had and received by an assured part owner of a vessel against an insurance broker who had received from the underwriters the full amount of the sums subscribed on a total loss.

Per Cur- It is clear that Roberts, the plaintiff, through the medium of *Evans*, contracted with the defendants, and they knew that *Evans* acted for *Roberts*, and *Roberts* was the only party contracting with them. It appears from a letter of the defendants, dated 1st of May, that they knew (how they knew it does not appear) that *Roberts*, by the letter, containing the order of the captain, authorised them to insure the ship for himself only; and they disclaim all agency for any other person. They, following his directions, insured the ship as his agent, and they received the money from the underwriters as his agent. It is true the plaintiff writes a letter, wherein he says that he ordered the insurance on the share of other persons, the *Welch* owners; but that was clearly the first intimation the defendants had that there were any other persons connected with *Roberts* in the adventure, and that he was not owner of the whole; that they themselves expressly stated in the postscript to their letter, in answer to that of the plaintiff. They would undoubtedly, as they state, have been entitled to recover the premium from *Roberts*, and from him only; and that would be sufficient to give him a right to recover on his own sole account in this action against them, on the ground of mutuality of liability. It was urged that all the owners might still bring an action against the defendant, notwithstanding this verdict. We think they cannot, for there is no privity between other persons and these defendants. There is nothing out of which the owners could make a case against them, whatever they might do against *Roberts*. It now appears, indeed that the plaintiff considered the defendant agent of others as well as himself; but that was not known to the defendants at the time when they effected the insurance, and they have since, in fact, disclaimed such agency in terms. The plaintiff alone employed the defendants; and they, as his agents, having once received the money from the underwriters, must be held to have received it for his use, and are, therefore liable to him for the amount. The action is, we think, in the proper form, and there is no ground for setting aside the verdict.

Graham, Baron. I had certainly some doubts in this case, but they are now entirely removed, and the opinion to which we most inclined during the argument, we now find confirmed by our Lord Chief Baron. The case of *Dixon* and another v. *Hamand* has had great weight with us; and we cannot distinguish the cases regarding this as we do a mere question between the principal and agent. We were certainly very much staggered by the letter of the

* A broker who has neglected to insure the premium according to the directions of his principal cannot set up as a defence that he was directed also to insure against British capture, for that is not a cause so as to render the whole insurance illegal, though it would be void *pro tanto*; see *Glover v. Cowie*, 1 M. & S. 52.

A broker by his conduct may render himself liable to the insured for the amount of a loss, in an action for money had and received, although he has not in fact received the money from the underwriters.*

A broker who has received the full amount of the insurances is liable to an action for money had and received, at the suit of a part owner of the vessel, altho' there are several other persons interested in the insurance, and who have given the defendant notice of their interest.

Brokers were directed to effect an insurance "at and from Teneriffe to London," held they were liable for not inserting in it "liberty to touch and stay at all or any of the Canary Islands," that being

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usually inserted in policies from Teneriffe.
Where a broker who has been ordered to effect a policy, represents that he has executed the order, an action of trover may be maintained against him for the instrument, although no policy has been actually entered into;
And he may avail himself of any ground of defence which would have been an answer to an action on the policy if properly effected.

plaintiff, wherein he states the interest of other persons; but we think the difficulty removed by the answer of the defendants, who disclaim in the postscript of that letter any agency for, and all knowledge of, any other person in the transaction than the plaintiff; considering this, therefore, as a case of principal and agent purely, without reference to any thing else, we think the defendants ought not, under the circumstances, to be allowed to turn the plaintiff round on the objections which have been raised to defeat this action.

7. MALLOUGH v. BARBER. H. T. 1815. K. B. 4 Campb. 150.

Action against the defendants for negligence in effecting a policy of insurance for the plaintiff. Being insurance brokers in London, they were ordered by the plaintiff to effect a policy of 550*l.* on the ship *Expedition* and freight at and from Teneriffe to London, at ten guineas per cent. They effected the policy in the words of the order communicated to them, without subscribing a liberty "to touch and stay at all or any of the Canary Islands."

Lord Ellenborough held that, under these circumstances, the defendants were liable for not having inserted the clause in the policy in question; and the plaintiff recovered a verdict for the sum directed to be insured, deducting the premiums.

8. HARDING v. CARTER. E. T. 1781. K. B. Park, Ins. 4.

Action of trover was brought against the defendants for two policies of insurance. The defendants were brokers, who had written to the plaintiff, the master of a vessel, that they had got policies effected, the one on account of the plaintiff's clothes and wages, the other on account of the owners, and that the underwriter was Mr. Newnham. A loss having happened, the defendant produced a policy, underwritten by one J. S., only insuring the ship in which the plaintiff had no interest. Lord Mansfield. I shall consider the defendants as the actual insurers, and, therefore, the plaintiff must prove his interest and loss.

The defence set up was, that the letter above stated in evidence was written by the defendant's clerk through mistake, and it was said that trover could not be maintained for that which never existed, but his lordship would not suffer the defendants now to contradict their own representation; and the plaintiff accordingly had a verdict to the amount of his interest, the premium being deducted.

9. DELANY v. STODDART. M. T. 1785. K. B. 1 T. R. 22. S. P. Bristow v. WADDINGTON. M. T. 1806. C. P. 2 N. R. 355.

Upon a motion for a new trial the facts appeared to be these:—The plaintiff, who lived at St. Kitt's, wrote a letter to the defendant, dated the 30th of April, 1781, informing him he intended to purchase a ship, and offering the defendant a share. On the 4th of May, 1781, he wrote a second letter to the defendant, acquainting him he had purchased the ship, but had only a share in it himself, the residue being divided into three or four more shares, one of which he had reserved for the defendant, in case he should wish to be concerned, and directing an insurance upon the ship at and from St. Kitt's to London, warranted to sail with convoy. On the 28 of June the defendant wrote to the plaintiff that he had no objection to a fourth, or a share equal to the plaintiff's. On the 3rd of July the plaintiff informed the defendant that the ship had left the port to take in her cargo; that she let go an anchor at Sandy Point, but as the wind blew fresh, she drove out, and could not come in again; that she was obliged to go to St. Eustatius; and he therefore hoped that the defendant had not neglected to make the insurance, for fear of accidents. The defendant on the 19th of July wrote thus to the plaintiff: "The insurance you ordered shall be done." Plaintiff again, on the 25th of July, wrote that the *Friendship* did all in her power to get up from St. Eustatius, but could not; and therefore he sold her to Mr. Ross, at St. Eustatius. In addition to which the following facts appeared in evidence: that the ship *Friendship* had sailed from

* But a broker is not liable to an action for damages, if nothing could have been recovered from the underwriter, although they may have been in the habit of submitting to losses on similar occasions; see *Webster v. De Tastet*, 7 T. R. 157. abridged, ante, 533.

St. Eustatius on the 1st of August, with the convoy, and that she had afterwards foundered at sea; that *St. Eustatius* is in the direct road to London from *St. Kitt's*, and the convoy from *St. Kitt's* always looked into *St. Eustatius*, to take up any ships that might be there; that if the *Friendship* had sailed from *St. Kitt's*, she must have gone by *St. Eustatius*, but would not have stopped there; that when she was driven to *St. Eustatius*, having made several efforts to get back to *St. Kitt's* to finish her loading, and finding she could not succeed, she then took in the rest of her loading at *St. Eustatius*. At the trial several grounds of defence were made; but the only one material for our consideration was, that the remaining at *St. Eustatius*, and not going back to *St. Kitt's*, was a deviation. The learned judge who tried the cause was of opinion that it was not a deviation, being occasioned by stress of weather. Upon this ground, amongst others, the motion for a new trial was founded. After argument at the bar,

Per Cur. It was said, the only material question is, whether there is a deviation in this case? and that depends on the evidence. If a storm drive a ship out of her voyage into any port, and being there she does the best she can to get to her port of destination, she is not obliged to return back to the point from which she was driven. But here the witnesses say she tried to get back to *St. Kitt's*, and could not; and it is a much easier navigation to go directly from *St. Eustatius* to London, than to go to *St. Kitt's* first; and as to the taking in the cargo at *St. Eustatius*, we do not find that the ship lost any time by it; every thing is the effect of the storm, and occasioned by it. This is the only point on which we had any doubt, and it required some consideration. It was a question which was proper to be left to a jury, whether this was the same voyage or not; and they have determined it.

(C a) RELATIVE TO THE REMEDIES FOR BREACH OF THE POLICY.*

1st. *At law.* (a) *Form of action.*†

(b) *When sustainable.*

HALL v. HOLLESTON. E. T. 1746. K. B. 1 Wils. 129. S. P. THOMPSON v. CHARNOCK. H. T. 1799. K. B. 8 T. R. 139.

This was an action upon a policy of insurance, wherein a clause was inserted, that, in case of any loss or dispute about the policy, it should be referred to arbitration; and the plaintiff avers in his declaration that there has been no reference. Upon the trial at Guildhall, the point was reserved for the consideration of the Court, whether this action could be sustained before a reference had been made; and, by the whole Court: "If there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot oust this Court; and as no reference has been made, nor any is depending, the action is well brought, and the plaintiff must have judgment."

(c) *Parties to.*

1. PARKER v. BERELEY. H. T. 1814. K. B. 2 M. & S. 426. HAGEDORN v. OLIVERSON. E. T. 1814 K. B. Id. 485.

Brokers effected policies of assurance on goods on account of their principals, but in their own names, and accepted bills drawn on them on account of the goods which were assigned to them, and lost before arrival.

Lord Ellenborough, C. J. In *Kosier Eason*, the Court said, as to those policies effected in the names of the brokers, on account of other persons, that the brokers could maintain an action in their own names, if they had a lien upon the policies; and by subscribing to policies in their own names, the underwriter had consented that they should be at liberty to stand in the character of brokers.

* By the statutes 43 Eliz. 2. s. 1. c. 13. and 14 Car. 2. c. 23. a particular court or tribunal was established for the determination of matters connected with policies of insurance. These courts consisted of commissioners appointed by the Lord Chancellor as Lord Keeper. Their jurisdiction was very limited, and considered not to exclude that of the superior judicial tribunals; 1 Show. 396; 2 Sid. 121. Ultimately they fall into disuse.

† The form of action to be adopted depends upon the question of whether the policy is under seal or on a simple contract; in the former case, the remedy is by action of debt or covenant; in the latter, special assumpsit.

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When the policy is effected in the name of a broker or agent, the matter shall be referred in a case of a loss or dispute.

acter and situation, that in case of loss they should be entitled to act in all respects as his creditors. That part of the case, therefore, was put upon the lien. Here if the parties had not had a lien, their names would have stood in the policy as mere naked names not coupled with an interest; but they may have an interest not only by a *del credere* commission, but also by a lien. The acceptance of the bills on the credit of the consignment gave them an interest and lien, and having a right to retain the policies, and the policies being in their own names, and the contract of the underwriter originally with them, they might have brought an action in their own names, and the Court would not have staid the proceedings unless the principals had indemnified them against the bill, in which case the Court would have suffered the action to go on for their benefit. Although they might not be interested in the goods originally, yet a subsequent interest may accrue by lien.

See 2 B. & A. 314; 16 East, 141; 13 Id. 341; 2 B. & P. 155.

2. MARSH v. ROBINS. H. T. 1802. N. P. 4 Esp. 98.

If the policy has been effected in the names of two persons, when only one of them is interested, the action may be brought in the name of that one.

In an action on a policy of insurance on freight, where the interest in a ship and its earnings were alleged to be in four persons, who were partners in trade; and it was proved by the plaintiffs that the ship had been paid for by all the four partners; but the defendant having produced the register wherein the ship was registered in the names of two of the partners only. *Le Blanc, J.*, held, that as the title to freight arose only from ownership, and the register was not conclusive evidence that only two were owners, and as there was not any count in the declaration stating the interest to be in two only, the plaintiffs could not recover.

3. CARTER v. EASON. M. T. 1813. K. B. 2 M. & S. 128.

But an insurance broker, who effects a policy, not in his own name, but in the name of his principal, can in no event sue thereon in his own name.

Defendant's insurance brokers effected several policies of assurance, some in the name and on account of their own firm, others in the name of their own firm but on account of their principals, and others in the name and on account of their principals, for which principals they acted under a *del credere* commission, without the knowledge of the underwriters. In an action brought against them for premium by the assignees of one of the underwriters upon those policies, who had become a bankrupt, the Court held, the defendant might set off losses and returns due on all such of those policies as were effected in the names of their own firm, but not on such as were effected in the names of their principals, such losses and returns having become due on those policies before the time when the bankrupt stopped payment, though they had never been adjusted by the bankrupt, but only by the other underwriters, between the time of his stopping payment and committing the act of bankruptcy, on which adjustment the defendants had given their principals credit for the amount.

4. MC CARTHY v. ABEL. E. T. 1805. K. B. 5 East, 393.

If the ship insured is sold with the policy the vendee cannot sue thereon

The plaintiffs, being owners of the ship, chartered her to Thorntons and Smalley for the voyage insured, for which freight was to be paid in certain proportions (restraints of princes and rulers during the voyage excepted). On the ship's arrival at Riga she was supplied with a cargo, and nearly the whole thereof had been taken on board, when an embargo, November, 1800, was laid on all the British shipping in the port of Riga. The case then states the relanding of the cargo, the abandonment to the underwriters on freight on the 11th January, 1801, of their interest in the freight, and demanded a total loss; and on the same day they abandoned the ship to the underwriters on ship. The case further states the restoration of the ship by Russia, the reloading of the ship, and the earning of the freight, which was paid by the freighters to the agent for the underwriters on ship, under an indemnity from them against any claims which might be made thereto, either by the plaintiff or by the underwriters on freight. The plaintiffs had duly assigned over, by an indenture, in February, 1801, the ship Thomas, and all the interest, property, claim, or demand, of the plaintiff's, in, to, or out of the said ship and her appurtenances, to two persons in trust for all the underwriters on the ship.

* And though the person whose name is used in the policy is interested in the property insured jointly with another, the action may be brought in his separate name, the joint interest being stated in the declaration; *Cosach v. Wells*, 1 Chit. on Pl. 5. 4th Edit.

Lord Ellenborough, C. J., delivered the opinion of the Court. "The novelty of the question in this case, the value of the property, and the extent to which some of the principals laid down in the argument seemed to be bad, made us desirous of every information on the different points which might arise between the several parties interested, before we come to our decision; and therefore we wished for a second argument on the effect of an abandonment of the ship on the accruing freight. If the question which arises upon this case be stripped of extraneous circumstances, it appears to resolve itself into this single point, whether the freight have been in this case lost or not? If the fact be merely looked at, freight, in the events which have happened, has not been lost, but has been fully and entirely earned and received by, or on behalf of the plaintiff, the assured; and if so, no loss can be properly demandable from the underwriters on freight, who merely insure against the loss of that particular subject by the assured. But if it have, or can be, in any other manner or sense lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship, which abandonment was the act of the assured themselves, and with which and the consequences thereof the underwriters on freight had no concern. It appears to us, therefore, that *quodcumque via dats*, that is whether there has been no loss at all of freight, or being such, it had been a loss only occasioned by the act of the assured themselves, that they are not entitled to recover. There must, therefore, be a judgment of nonsuit.

(d) *Holding to bail.*

LEVI v. HEATH. M. T. 1813. C. P. 5 Taunt. 201; S. C. 1 Marsh. 19. *LUMBE v. DUBOISE.* Id. 21. *GRANT v. ROYAL EXCHANGE ASSURANCE COMPANY.* M. T. 1814. K. B. 5 M. & S. 439.

Rule nisi to cancel the bail bond which had been given by the defendant to the sheriff in this case, the defendant having been holden to bail upon an affidavit stating that he was indebted to the plaintiff in a sum for a total loss upon a policy of insurance. It was contended, first, that there were neither practice nor reason which prevented his arrest. The plaintiff had positively sworn that the defendant was indebted. The loss was sworn to be a total loss, which made the amount as certain as the amount of any other debt could be. If the plaintiff swears falsely or maliciously, the defendant has his appropriate remedy in cases of adjustment, or of actions for recovering back the premium. Defendants may be holden to bail on the policies. This was distinguishable too from cases of average loss, which are more uncertain in amount. It may be assumed to be the ordinary practice of the Court of King's Bench, to arrest in all cases on policies of insurance; for it is sworn that the sealer of writs on inquiry says, that bailable process is sometimes issued in actions on policies of insurance.

Per Cur. The plaintiff has not confined himself to holding the defendant to bail for the 80*l.* which the defendant has admitted, but has arrested him for the whole demand as for a total loss. In this instance, as in all others the party who acts in contradiction to the practice of the Court must pay the costs.

(e) *Declarations.* 1st. *Venue**

2nd. *Setting out policy.*

* The action on a policy of insurance being of a transitory nature, the venue, if laid in a different county from that in which the cause of action arose, may be changed at the instance of the defendant on the usual rule; see *Tidd*, 624. 7th Edit.; 2 T. R. 275; 7 Id. 205; *Andr.* 66; 2 *Stra.* 1180; *Say. Rep.* 7; 7 *Taunt.* 306; unless the policy be under seal; *Tidd*, 625. 7th Edit.; 1 T. R. 781; 1 B. & B. 20. 425; 1 *Chit.* 334; 3 B. & C. 669. The application for changing it must be made before the defendant has pleaded either in abatement or in bar, 4 *Bing.* 18; *Sayer*, 207; upon an affidavit that the cause of action, if any, arose in the county of A., and not in the county of B., or elsewhere out of the county of A.; see *Tidd*, 630. But the venue cannot be changed where the cause of action arises out of the realm, 7 T. R. 295; *Tidd*, 623; and in transitory actions, if material evidence arise in two counties, the venue may be laid in either; and if it be laid in a third county, the Court will not change it; *Tidd*, 623.

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The policy is to be set out in the past tense, according to its legal effect, the regulations indorsed being deemed part of it; if it be stated, though unnecessarily, that the plaintiffs were the persons residing in Great Britain who received the order for and effected the insurance, the allegation must be proved.

When the policy is effected through the medium of an agent, it need not allege the agency. When a policy is in common form on ship and goods, a general averment is proper that the defendant became an insurer on the premises mentioned in the policy. Where the insurance is on a particular species of goods, an averment that divers goods were put on board is made sufficiently definite by a subsequent allegation that the insurance was made on the goods.[†]

Where particular exceptions to a general

1. **STRONG v. HARVEY.** M. T. 1825. C. P. 3 Bing. 304.

Per Cur. The policy is to be set out in the past time, according to its legal effect, the regulations indorsed being deemed part of it.

2. **BELL v. JANSON.** H. T. 1813. K. B. 1 M. & S. 201. S. P. **CASE v. BARBER.** M. T. 1780. K. B. 1 Raym. 450; S. C. 2 Salk. 519; 1 Saund. 276.

The plaintiffs declared on a policy of assurance, and averred that they were the persons residing in Great Britain who received the order for and effected the insurance. This was considered as a material averment, and not sustained by evidence of a letter received by them after the policy was effected directing to make insurance; although the policy was originally on goods on board the Anne, on ships, or by whatsoever other name the ship should be named; and the plaintiffs, upon receipt of their letter, procured a memorandum to be made on the policy signed by the defendant, declaring the interest to be on board the Herald, the ship mentioned in the letter.

Great Britain who received the order for and effected the insurance, the allegation must be proved.

3. **HAMILTON v. MENDES.** T. T. 1741. K. B. 2 Burr. 1198.

Per Cur. When the policy is effected in the port of the insured, through the medium of an agent, it may be alleged as if made directly, without stating the agency.

4. **HOUGHTON v. EWBANK.** M. T. 1814. K. B. 4 Campb. 88.

In an action on a policy of insurance, the policy was in the common printed form, on ship and goods, but contained a written memorandum, stating that the insurance was on goods which were declared and valued. The declaration averred that the defendant became an insurer of the sum of 200*l.* upon the premises in the said policy of insurance mentioned. It was contended that it could only be said that the defendant became an insurer upon the premises mentioned in the policy, where he insured both ship and goods; but

Lord Ellenborough observed, that where there is a written memorandum, declaring the policy to be on goods, the effect is the same as if goods only were mentioned in the policy, and that the word "premises" is an apt description of the subject matter actually insured, whatever that may be.

5. **DE SYMONDS v. JOHNSTONE.** M. T. 1805. C. P. 2 N. R. 77.

In an action on a policy of insurance of indigo and bale of goods, after setting out the policy, it was averred in the declaration that certain persons using trade, &c. under the firm of L., H., S., and Co., were then and there, and from thence until and at the time of the loss hereinafter mentioned, interested in the said goods and merchandizes to a large amount; and that the said writing or policy of assurance so made as aforesaid, was made on the said goods and merchandizes, and to and for the use and benefit, and on the account of the said L., H., S., and Co.; and then proceeded to state, that the said ship or vessel, with the said goods and merchandizes on board of her as aforesaid, was by the force and violence, &c. (perils of the sea) lost. On special demurrer, because it was not averred that the goods stated to have been loaded on board were indigo or bale goods, the Court observed that the allegation in the declaration that the policy was made on the goods put on board, completely answered the objection taken, since that could not be true unless indigo goods were loaded on board, which it would be necessary for the plaintiff to prove at the trial.

By a subsequent allegation that the insurance was made on the goods.[†]

6. **RUCKER v. GREEN.** E. T. 1812. K. B. 15 East, 293.

Assumpsit. A policy of insurance, underwritten by the defendant upon goods on board the ship Fortuna, at and from London to any port or ports, in the Baltic, backwards and forwards, &c., and by the policy set out it was de-

* But clauses which do not bear upon the plaintiff's cause of action, and are unnecessary to a just comprehension of it, need not be detailed; see 4 Taunt. 285. The qualifications introduced into the contract by means of warranties or exceptive stipulations should be stated.

† It seems that a declaration in a policy on goods should aver that they were put on board at the loading place; see *De Symonds v. Shedden*, 2 B. & B. 153.

clared, in addition to the ordinary terms, to be an insurance on goods "war-risk are ranted free from capture and seizure in the ship's port or ports of discharge." made by And afterwards the plaintiffs averred the loading of the goods on board the warranty, ship to be carried on the voyage insured; the interest of the several proprie- the assured tors, as agents for whom they had caused the insurance to be made; and the in declaring sailing of the ship with her cargo on the said voyage; and that afterwards, and on a loss by before the said goods were discharged in safety, the said ship, with the said risk, goods on board thereof, was, with force and arms, and in a hostile manner, seized by certain persons to the said proprietors unknown, and thereby the said need not goods became and were wholly lost to them; whereof the defendant had notice, by reason whereof he became and was liable to pay the sum insured by him, &c. Motion to arrest the judgment for want of an averment, negativ- negative the excep- ing that the loss by seizure was in the ship's port of discharge. tions. [544]

Per Cur. By the general terms of the policy the underwriter is liable for all capture and seizure; but if the capture or seizure be in a particular place, for which the defendant is not liable by the warranty, that is to be shown by way of defence from him; after verdict, therefore, we must presume that the seizure was proved to be in a place where the defendant was liable to answer for it. We cannot now intend that the seizure proved was one for which he was not liable.

7. *ROGERS v. MAYLOR.* T. T. 1790. K. B. Park, 163; S. C. Marsh. 644.

CHRISTIAN v. COOMBE. M. T. 1790. N. P. 2 Esp. 489. *DE GAMON v.*

GALBRAITH. T. T. 1790. K. B. Park, 183. *SHERIFF v. POTTS.* M. T. 1803. K. B. 5 Esp. 96.

Case on a policy of insurance on ship and goods from London to Shelborne, in Nova Scotia. The policy had been adjusted by the defendant, at fifty per cent. and it was contended that he was now bound by that adjustment. On the other hand, it was argued that the adjustment was not binding; and that if it were it ought to have been declared upon specially.

Lord Kenyon said that he did not think it necessary to declare on the *prima facie* evidence against the defendant; but if there had been any misconception of the law or fact upon which it had been made, the underwriter was not absolutely concluded by it. This turned out to be the case; and there was a verdict for the defendant.

3rd. *Averment of interest.*

1. *COUSINS v. NONTES.* E. T. 1811. C. P. 3 Taunt. 513. S. P. *NONTES v.*

THOMPSON. E. T. 1802. K. B. 2 East, 385. S. P. *GARAM v. SWEET-*

ING. H. T. 1797. C. P. 2 Taunt. 200. *sed vide.* *CRAUFORD v. HUNTER.*

M. T. 1798. K. B. 8 T. R. 15. 3 B. & P. 75.

The plaintiff averred, amongst other matters, that the ship Hoop was not, at the time of effecting the policy, or at the time of the happening of the loss thereafter mentioned, or at any other time whatsoever, the property of, nor belonging to, his Majesty the King of Great Britain, or of any of his subjects; and that the plaintiff below, together with R. M. French, were the persons who gave the orders to the agent immediately employed to effect that policy; and alleged a loss by arrest by order of his Majesty, and condemnation in the Court of Admiralty. The defendant below demurred, and assigned for causes, that it was not alleged, nor did it appear by the first count of the declaration, for whose use or benefit, or on whose account the policy was made; and also for that it was not therein alleged to whom the ship in that count mentioned did appertain in part or in all, or what person or persons were interested or concerned in the insurance effected thereon by that policy; and also for that it was not alleged, nor did it appear, that the assured or either of them, or any other person or persons whatsoever, had any interest, property, or concern in the ship or insurance; and also that it was alleged that the ship became wholly lost to the assured, and to every other person to whom the same did or might appertain in part or in all; but it was not alleged nor did it appear with sufficient certainty by the declaration, to whom or to what other person or persons, besides the assured, the ship became wholly lost; and that it appeared by the fact.

When an adjustment has taken place, it need not be declared upon especially but may be given in evidence as an admission upon the usual declaration.

An allegation of interest is necessary, even in the case of a foreign ship unless the policy contains a clause denoting the proof of interest to be unnecessary, as the words "in interest," or other words to the like effect.

declaration, that the action in that respect was brought for the use of the plaintiff below, as the survivor of R. M. French, and also of every other person to whom the ship did or might appertain in part or in all; but it was not alleged, nor did it appear by the declaration and with sufficient certainty, to how many and what other persons the ship did appertain in part or in all.

Per Cur. On a wagering policy there is no salvage, no abandonment, no return of premium for short interest; it is the interest of the insured that the ship should be lost, but it is the contrary on a policy of interest; there is salvage, there is abandonment, there is a return of premium for short interest; there it is usually the interest of the merchant to labour for the safety of the vessel. Consequently, it is absolutely necessary, in order to give the underwriter a fair advantage, that he should know it is a wagering policy. In this declaration it is alleged that the ship did not belong to the King or any of his subjects; this was intended to supply the necessity of words tending to show it was a wagering policy. But it is not enough to show these circumstances in the declaration, if they are not shown in the contract; it is necessary that it should be inserted in the contract, whether the policy is a wagering policy or not. This then is not a wagering policy, but an ordinary policy, made for the purpose of indemnifying the person insured, and there is no declaration upon such a policy in any case since the statute 19 Geo. 2. c. 37. of which we are aware, except that of *Crauford v. Hunter*, wherein the allegation of interest has been omitted. Upon such a policy, therefore, we are of opinion, according to the practice of sixty years, since the statute, that it is necessary to allege the interest in the declaration, in order that the defendant may see what that interest is, and in whom it is; for it is very necessary that the plaintiff should know what interest is intended to be relied on, because he may by disproving it in many cases defeat the action. We, therefore, think, that on this declaration, the plaintiff in the court below ought not to have recovered.

2. *PAGE v. FAY.* T. T. 1800. C. P. 2 B. & P. 240; S. C. 3 Esp. 185.

And whether on goods must correctly describe the parties in whom the interest is vested;

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In a declaration on a policy of insurance, effected by the plaintiff, as agent of A. and B., it was averred "that A. and B., at the time of effecting the policy, and thence until the time of the loss, were interested in the goods insured to a large amount; to wit, to the amount of all the money ever insured thereon." At the trial it appeared that at the time when the policy was effected, another person was jointly interested in the goods, together with A. and B. The Court were of opinion that, although A. and B. had not an exclusive interest, yet they had such interest as would answer the terms of the averment;

Chambres, J., observing, that the averment, in substance, was nothing more than that the parties for whose benefit the assurance was made had an interest in the subject of the insurance. They were not bound by the terms of the averment to show any thing more than that they had an interest; and if they had shown an interest to the extent of one-hundredth part of the cargo, it would be sufficient. The spirit of the stat. 19 Geo. 2. only required that the policy should not be a gaming policy.

See 2 B. & P. 155; 16 East, 145; 6 Taunt. 14; 1 Marsh. 416.

3, *EMANUEL v. HANNOM.* T. T. 1813. C. P. 5 Taunt. 101. *BELL v. AUDLEY.* T. T. 1812. K. B. 16 East, 141.

This is a material allegation, which requires to be proved in substance as stated.

On the question whether it is necessary in a declaration on a policy truly to describe the interest on which the policy is effected?

Per Cur. The simple question in this case is of the averment of interest. It happened that Emanuel and Solomon Cohen were partners; and the action is brought in the name of Emanuel, and there is an averment in each count, that the interest is in one of them; and the declaration is in the ordinary form, as if the assurance had been for one, and for his sole benefit; and the plaintiff has recovered in this action for the whole loss, as if the interest was in him. No doubt, in a different form of declaration, he might have recovered for his moiety. The verdict is certainly wrong, for it gives him who is entitled to a moiety only, the whole; therefore the verdict cannot stand.

4. MELLISH v. BELL. H. T. 1812. K. B. 15 East, 4.

A declaration stating that the plaintiffs (M. and another) caused to be effected a policy, containing that J. G. and Co. did make assurance, and averring the interest in F. W. S., with a promise by the defendant to the plaintiffs, in consideration of the premium paid by them, was held good after verdict; for it must be intended that the plaintiffs insured under the names of J. G. and Co. and that they were proved to be within one or other of the descriptions of persons in the stat. 28 Geo. 3. c. 56. in whose names or usual style or firm of dealing insurance may be made.

5. NANTES v. THOMPSON. E. T. 1802. K. B. 2 East, 385. KELLNER v. MESURIER. M. T. 1803. K. B. 4 Id. 396.

Declaration on a policy of insurance on a foreign ship, "interest or no interest" in the policy. Demurrer, alleging for causes, that it was not alleged, nor did therein appear, for whose use or benefit, or on whose account the policy was made; nor to whom the said ship appertained in part or in all; nor what person or persons were interested or concerned in the said insurance, &c.; nor that the plaintiff, or any other person or persons, had any interest, property, or concern, in the ship. Also, for that it is alleged that the said ship became wholly lost to the plaintiff, and to every other person to whom the same did or might appertain in part or in all; but it was not alleged, nor did appear with sufficient certainty, to what other persons besides the plaintiff the said ship became wholly lost, &c. Joinder and demurrer.

Per Cur. The question in this case is, whether in a declaration on a policy which on the face of it, has no words to show it not to be an interest policy, it be required that the plaintiff should aver an interest to be entitled to recover? In the course of the argument it was admitted that the vessel, being foreign, was the subject of insurance, whether the assured had an interest in it or not; and it does not seem that an underwriter is likely to suffer any inconvenience from that not being expressed in the policy, inasmuch as at the time of the subscription he may be informed whether the ship be or be not a foreign vessel, and whether the assured have an interest or not; and if he have such interest, the underwriter must be entitled to all the advantages arising therefrom, according to the case of *Le Pyper v. Tarr*. 2 Vern. 716. whatever may be the form of the policy. The argument for the defendant turns upon a criticism upon the word "assured," and upon confining that word to its original and proper meaning, and not allowing it to be understood in a looser and less proper sense, which it has acquired. That the word "assured" may be understood to import a contract to pay a certain sum on the happening of the events specified in a policy, without any regard to interest, seems to follow from what was not denied by the defendant's counsel, viz. that the plaintiff might have recovered, had the policy used the word "interest;" in which case, unless a sense be given to the word "assured" different from its proper meaning, there would be a contradiction in terms; for it would be a contract to indemnify a man against risks by which, on the face of the instrument, it would appear that he could not be damaged; and to make such contract intelligible, the words "interest or no interest" must be understood as pointing out that the word "assured" was not to be understood in its original and proper sense. The case of *Goring v. Sweeting*, Saund. 200. was a policy valued at 300*l.*, without further account of the same, the effect of which was to make it unnecessary to prove the amount of the interest at the trial. But that could not, according to any rule of pleading, dispense with the necessity of averring an interest, if without such averment there could be no breach of the defendant's undertaking, which is the objection in the present case. Nor could the allegation of an offer to abandon supply the want of the averment; for that was an allegation perfectly immaterial; it need not have been proved to have entitled the plaintiff.

6. WRIGHT v. WELBIE. H. T. 1819. K. B. 1 Chit. Rep. 49.

An averment in a declaration on a policy of insurance that A., B., C., D., and certain persons trading under the firm of E., F., and Co., were interested in the property. On motion in arrest of judgment;

A declaration that the plaintiffs, A. and B., caused to be effected a policy containing that C. and Co. did make assurance, and averring the interest in D., is unobjectionable after verdict.

[547] In a declaration on a foreign ship not the property of the King, or of any of his subjects, there should be an averment to that effect in lieu of an averment of interest.

An averment that A., B., C., D., and certain persons trading under the firm of E., F., and Co., were interested in the property.

[548] *Per Cur.* We think that the allegation in the declaration is proved, because it is shown that certain persons trading under the firm of W. J. Bell and Co. were interested in the subject insured in behalf of themselves and any other partners, if such there were. As to the other question, the case is, whether we ought to arrest the judgment on the ground that the names of the persons said to be interested are not stated? Now, with reference to that objection, the cases in 3 Camp. 240; 14 East. 210; were relied on, in one of those cases the question of variance had arisen, because the parties had misdescribed the interest. It was represented that the policy was effected for A. only, whereas it turned out that it was effected for A. and B. In another of the cases the declaration averred that the interest was in two persons, but it omitted to name one of them, and, therefore, that case was decided on the ground of an obvious variance; the subsequent case of *Cohen v. Harman* proceeded entirely on the same ground, adopting the reasoning of the case of *Bell v. Ansley*, 16 East, 141. All these cases are, therefore out of the question. We see no objection to this declaration on the ground that the plaintiff described persons as interested, trading under a particular firm, and not named them. If the defendant wanted to have known the names of these persons, the proper way to have raised this question would have been by special demurrer on that ground; but not having demurred, we think the objection is cured, and that he is now too late. The third objection is, that the policy being to any port and ports of the Baltic, and the voyage being illegal to some ports, it must be illegal to all, without a licence to go to the ports which happened to be in a state of hostility. Now if the ship had gone to any of the other ports which were not in a state of hostility, it would not operate as any objection upon the face of the contract, nor does it in fact operate as any objection if a ship was going upon a voyage legal in its inception. We recollect a case very like this, see 15 East, 18; 3 Campb. 61, where it was decided that a policy for a voyage to St. Domingo, part of which was under French dominion, in time of war, was not illegal, although described generally as a voyage to St. Domingo, because the law would imply an exception in favour of that part of the voyage which was intended originally to be legal. For these reasons we think there is no ground made out for disturbing this verdict.

7. *CARRUTHERS v. SHEDDON*. H. T. 1815. C. P. 6 Taunt. 14; 1 Marsh. 416.

It does not appear necessary to specify in what proportion the several persons were interested; [549] An action on a policy of insurance effected by the plaintiff, as agent, as well in his own name as in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, on the ship *Ranger*, from St. Domingo to London, by order and on account of Messrs Nathaniel Dowrick and Co. The declaration afterwards averred that the said policy was made by the plaintiff as the agent of Nathaniel Dowrick and J. Way and for their use and benefit; that a quantity of coffee was shipped at St. Domingo on board the same ship; and that the said Nathaniel

Dowrick and J. Way were then, and from thence until the time of the loss, interested in the said coffee to the amount of all the monies by them insured. By an agreement on the 19th of March, 1810, between Nathaniel Dowrick and J. Way, of the City of London, merchants, carrying on trade under the firm of Nathaniel Dowrick and Co. of the first part, T. Dixon of the second part, D. H. of the third part, and I. R. of the fourth part, it had been agreed that the said T. Dixon, D. H. and I. R. should become interested in an adventure of sundry goods which the said Nathaniel Dowrick and J. Way had purchased on their own separate credit, to be disposed of at Hayti, and the proceeds thereof to be invested in the purchase of sundry other goods, to be consigned to the joint account of the said Nathaniel Dowrick and J. Way. The declaration originally contained several other counts, stating the interest to be in the different parties to the agreement; but on a summons before Chief Justice Gibbs, he ordered the additional counts to be struck out. It was objected on the part of the underwriters, that the plaintiff was not entitled to recover more than the interest of Dowrick and Co., confining that form to Dowrick and Way; and that that objection would have applied equally though the counts averring the different interests had not been struck

ent. His Lordship left it to the jury to say whether, by the term *Dowrick and Co.*, the policy had been intended to comprehend all the adventurers, or only the two persons who composed the original firm, observing at the same time that they were not to give the policy this extended construction merely because they thought the justice of the case required it, unless they should be warranted by the facts. The jury said they had no doubt but the fact was that all the adventurers were meant to be included. The case was, however, reserved, and

Lord Chief Justice Gibbs. I reserved this point for the defendant, and have desired my brothers to take it into their consideration, and they are of opinion that there is no reason for setting this verdict aside. Another ground on which I should have directed a verdict for the plaintiff, even though I have considered that the interest ought to have been confined to *Dowrick and Way*, was, that they were consignees of the cargo, and that, therefore, they had a lien on it, which entitled them to make this insurance.—Rule refused.

8. *MARCH v. ROBINSON.* H. T. 1802. K. B. 4 Esp. 98.

Two partners purchased a ship under a regular bill of sale, conformable to the 26 Geo. 3. c. 60. (Lord Hawkesbury's act). They afterwards took in two other partners, who paid their respective shares in the ship; but there was no transfer to them under the direction of the statute. The Court held that the four partners had not an insurable interest in the freight; for as the right of freight results from the right of ownership, these four partners had not shown in themselves jointly (as laid in the declaration) either a legal or equitable title to the ship.

9. *RHIND v. WILKINSON.* H. T. 1810. C. P. 2 Taunt. 237.

On the question, whether the averment of interest at the time of effecting the policy is immaterial? the Court held, as to the time of the commencement of the plaintiff's interest, that if the declaration had averred that he was interested at the time of the ship's sailing, or that the policy was made on a certain day, and that afterwards, on a subsequent day, the plaintiff acquired an interest, it would have sufficed; and if that would have been good, the allegation of interest at the time of effecting the policy was an immaterial allegation, policy is and needed not to be proved. It was immaterial to aver interest at any day previous to the commencement of the risk. It is an every day's practice to insure goods on a return voyage long before the goods are bought.

10. *BELL v. ANSLEY,* T. T. 1812. K. B. 16 East, 146.

The declaration was upon a policy; and upon the only count that could be supported, the interest was averred to be in John Bell, and the policy was stated to be made to and for the use and benefit and on account of the John Bell.

Per Cur. The persons really interested were J. Bell, and his brother, W. Bell, and the policy was made for their joint use and benefit, and on their joint account; and the question is whether, where several are jointly interested, and a policy is made on their joint account; it is sufficient to state that one of them was interested, and that the policy was made on his account? and we are of opinion it is not. By the stat. 19 Geo. 2. c. 37. insurances without interest by way of gaming, except in certain excepted cases, are made null and void to all intents and purposes; and since that statute the constant practice has been to state in whom the interest is, and for whom the policy was made, and to make that statement according to the real fact. It was contended upon the argument that the only object of the statement was to show that the policy was not a wager policy, and that this object was sufficiently answered by specifying the name of any one of the interested parties. But we are of opinion that this is not the only object; the underwriters are entitled to have it stated truly upon the record whose interest the policy was to protect. Though an action upon a policy may be brought in the name of the person who effected it, though he be not the person actually interested, yet the persons interested are so far looked upon as parties of the suit, that the declarations of any of them are received as admissible in evidence against the plaintiff, with a view to apprise the

And the plaintiff may be admitted to prove a sole interest in himself, although the policy was effected in the names of two persons.

[550] An averment off in interest at the time of effecting the policy is immaterial, and if alleged, need not be proved; it suffices to prove that the interest was vested during the period of the risk. The payment of the money into court precludes the defendant from objecting that the averment was not substantiated.

underwriter, whose declarations it may be material for him to be prepared to disprove, and whose case he is to meet, he ought to be truly informed by the record for whose interest and on whose behalf the policy was made. It certainly is material also, in point of public policy and convenience, that disclosure of the bare interest meant to be covered by the policy should be made, in order to exclude the property of enemies from the benefit of British insurance. Two cases were relied on by the plaintiff; *Page v. Fry*, 2 B. & P. 240. and *Hiscox v. Barrett* (a MS. case, at Guildhall, in December 1747, before Lee, C. J.) The case of *Page v. Fry*, however is clearly distinguishable. There the interest was averred to Hyde and Hobbs; the policy was on goods, for which Hyde and Hobbs had paid; but the concern being too large for them, they had offered Hacks a joint concern, which he had accepted. It did not appear that Hacks even knew of the insurance; and the question discussed was not upon the allegation that the policy was made upon the account and for the benefit of Hyde and Hobbs, but upon the allegation that Hyde and Hobbs were interested in the goods to a large amount, to wit, to the amount of all the money ever insured thereon. Upon this ground, therefore, it is a material allegation, viz. the allegation on whose account and for whose use and benefit a policy is made, and that the statement ought to be according to the truth. We are of opinion that the variance in this case was fatal, and that the rule for a nonsuit should be made absolute.

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4th. Averment that ship sailed, &c.

1. *PEPPINS v. SOLOMONS*. H. T. 1794. K. B. 5 T. R. 496; recognized *LUCENA v. CRAUFORD*. M. T. 1806. C. P. 2 N. R. 308.

This averment is introduced to show a compliance with the requisitions of the policy; but whether the ship sailed before or after making the policy is immaterial.

In an action on a policy of insurance, the declaration stated that, after the making the policy the ship sailed. The evidence was, that she sailed before. *Per Cur.* The case of *Bristow v. Wright*, Doug. 665. has been sometimes doubted; but we are still of opinion, that it was rightly decided. In order to entitle the plaintiff to maintain that action, it was necessary for him to show that he was the landlord, it being an action against the sheriff, for taking the lessee's goods without leaving a year's rent; and to show that plaintiff was the landlord he was obliged to set forth a contract between himself and the tenant. Now contracts are in their nature entire; and in pleadings they must be stated accurately. But as the evidence in that case did not accord with the contract stated in the declaration, and which was the foundation of his action, it was properly determined that a judgment of nonsuit should be entered. In the other case cited, *Savage v. Smith*, 2 Blac. 1101. we admit that it was not necessary for the plaintiff to state the judgment; but as the plaintiff alleged that the party recovered a judgment, and that he sued out a writ of execution upon the said judgment, the execution was necessarily tied down by that judgment, and therefore the judgment was made material by the subsequent words which were introduced. So, in actions for words, where a long introduction is unnecessarily inserted in the declaration, if the charge be tied up to that introduction, the letter must be proved, because the material part is thus made to depend on the immaterial part of the declaration. But the averment in this case does not arise out of the contract; nor is the contract, as stated in the declaration, made to depend upon it. And if this averment were omitted, the declaration would be perfect without it.

2. *ABBOTTAL v. BRISTOW*. H. T. 1816. C. P. 6 Taunt. 462; S. C. 2 Marsh. 157.

But with reference to the period at which [552] the loss took place, an averment that the ship

Goods are insured at and from Mogadore to London. The declaration avers, that after loading the goods the ship departed on her intended voyage, and while in the course of her said voyage was lost by the perils of the sea.

Lord Chief Justice Gibbs. I have no difficulty about the principle which is contended for. I agree that, where an immaterial averment is coupled with a material one, provided the latter be proved, it is sufficient, though the former be not proved, and that the plaintiff is not to be prejudiced by having produced an immaterial and irrelevant allegation. I also agree with the principle of *Peppins v. Solomon*s, ante 551. because, whether the ship sailed before or after

the policy was effected was immaterial, provided she had sailed on her voyage at all; for the question was, whether the policy had attached or not? I likewise concur in the decision of *Rhind v. Wilkinson*, where the Court held, that an averment of interest at the time of effecting the policy, and of the loss, was satisfied by proof of interest at the time of the loss, because an allegation to that effect only would have been sufficient. The present case, however, is very different. The policy is "at and from Mogadore to London." If it had been only from Mogadore, the loss that took place while the ship was at Mogadore would not have been within the policy; but being at and from Mogadore, it embraces the losses at Mogadore, as well as those which might have happened during the voyage homewards. But the two cases may call for very different consideration. When the vessel is on her voyage homewards, she must be completely seaworthy, fully manned, rigged, and virtualled; that, however is not necessary while she remains in port. The case, therefore, presents a very different aspect to the underwriters whether the ship were lost while at Mogadore or on her voyage. The plaintiff may have a good cause of action, but he has mistaken his course, because he has stated that the loss happened during one period to which the policy applied, whereas, in fact, it took place during another; and, as different proofs would be required to substantiate the loss in one case, from what would be necessary to establish it in the other, I think the objection is fatal.

Mr. Justice Dallas. The general principle is clear, that the loss must be substantially stated as it happens; and the question is, whether it be so stated here? The ship was lost before the voyage commenced, and while she was at her moorings; can there be a more essential difference between that fact and the allegation? The plaintiff is begging the question when he says that the material part of the allegation was proved, and that the rest was mere surplussage.

5th. Averment of the loss.

1. *CULLEN v. BUTLER*. M. T. 1816. K. B. 5 M. & S. 461; S. C. 4 Campb. 289. 1 Stark. 138. *S. P. BUTLER v. WILDMAN*. H. T. 1820. K. B. 3 B. & A. 398. *PHILLIPS v. BARBER*. M. T. 1821. K. B. 5 Id. 161. *ROHL v. PARR*. H. T. 1796. N. P. 1 Esp. 445. *KULER KEMPE v. VEYNE*. T. T. 1796. K. B. 1 T. R. 304.

In an action on a policy, where the loss was stated to be by fire, it appeared that the ship in question, having been chased by an enemy of superior force, the captain, in order to prevent her from falling into the hands of the enemy, set her on fire. It was holden that this loss was covered by the policy. The cause of loss must be correctly stated.

Lord Ellenborough, C. J., observing, that if the ship is destroyed, it is immaterial whether it is occasioned by a common accident, or by lightning, or by an act done in duty to the state; nor could it make any difference whether the ship was thus destroyed by third persons, subjects of the King, or by the captain and crew acting with loyalty and good faith. Fire was still the *causa causans*, and the loss was within the perils insured against. [553]

2. *NEZBIT v. LUSHINGTON*. T. T. 1792. K. B. 4 T. R. 783.

A ship laden with coals and wheat, which were the subject-matter of insurance, was forced by stress of weather into a harbour in Ireland, and there happening to be a great scarcity of corn there at that time, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove on a reef of rocks, where she was stranded, and they would not leave her till they had compelled the captain to sell all the corn except about ten tons, at a certain rate, which was about three-fourths of the invoice price. The ten tons were damaged in consequence of the stranding, and it became necessary that they should be thrown overboard. The ship afterwards arrived in safety at her place of destination with the remainder of her cargo, which was about 25l. worth of coals. It was contended, that the loss sustained was a general, and not a particular, average; but the Court were of a different opinion. Hence an averment of loss by a seizure by an armed body of rioters, is not equivalent to an averment of a loss by seizure by pirates, unless the seizure be proved to the insured unknown.

Lord Kenyon, C. J., observing, that this was not a general average, because the whole adventure was never in jeopardy. There was not any pre-

tence to say that the persons who took the corn pretended any injury to the ship, or to any other part of the cargo, except the corn, which they wanted, in order to prevent their suffering in a time of scarcity; therefore the plaintiffs could never have called on the rest of the owners to contribute their proportion, as upon a general average.

3. *KNIGHT V. CAMBRIDGE*. H. T. 1782. K. B. 1 Strar 581; 2 Ld. Raym. 1346; 8 Mod. 230.

It is a sufficient allegation of barratry that the goods were lost by the fraud and negligence of the master and mariners.*

In an action upon the case on a policy of insurance on the ship *Riga* Merchant, "at and from Port Mahon to London, against barratry of the master, among other things, and all other damages, dangers and misfortunes, which should happen to the prejudice and damage of the said ship;" the breach assigned in the declaration was the loss of the ship, "by the fraud and negligence of the master." The plaintiff had judgment in the Court of Common Pleas. The defendant brought a writ of error, and it was contended by his counsel, that the words "fraud and negligence," used in the declaration, were more general than the word "barratry;" and that the breach should have been express "that the ship was lost by the barratry of the master;" that if the word barratry do import fraud, yet it does not import neglect; and that the fact here alleged is, that the ship was lost by the fraud and negligence of the master. But the Court were unanimously of opinion that there was no occasion to aver fact in the very words of the policy; but that if the fact alleged came within the meaning of the words in the policy, it would be sufficient. Barratry imports fraud; and he that commits a fraud may properly be said to be guilty of a neglect, viz. of his duty. Barratry of a master is not to be confined to the master's running away with the ship; but it extends to any fraud of the master. The end of insuring is to be safe in all events; and it would be very prejudicial if we were to make loop-holes to get out of these policies.—The judgment was affirmed.

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A count on a policy stating a loss by the perils of the sea appears to be sustainable upon proof that the ship was wrecked, although this was occasioned by the barratry of the master and mariners.

4. *HEYMON V. POUCH*. E. T. 1809. K. B. 2 Campb. 149.

Lord Ellenborough. I know that Mr. Justice Buller once held that if you declare upon a loss by the perils of the seas, and the defence is the misconduct of those on board, and that misconduct when proved, turns out to be barratry, you cannot recover; but I have thought about it, and never could see the reason for that doctrine. Should it come before me, I think I should hold otherwise. If a plaintiff declare for loss by perils of the seas, he cannot recover upon a loss merely barratrous, as a fraudulent sale, or the like. But here the loss is proved; and the barratry can be no surprise upon the defendant, for it is his own case.

5. *ARCONGEOLO V. THOMPSON*. H. T. 1811. K. B. 2 Campb. 620.

So, a count stating a loss by capture is sustainable on proof that the ship was captured by a privateer.

Count on a policy of insurance laying the loss by capture; evidence that the ship was captured by a privateer, although this happened by a collusion between the master of the ship and the commander of the privateer. It was for the defendant, objected, that the loss was not proved as laid, and had not arisen from an hostile capture, but from the barratry of the master.

Lord Ellenborough.—The plaintiff was no party to the barratrous agreement under which the ship was taken. As to him the loss actually arose from the capture. He might have recovered under a count laying the loss by barratry; but actually as the ship was taken by a French privateer; I think this declaration laying the loss by capture is sustained by the evidence.

See 1 Taunt. 227; Peake, 212; 2 N. R. 336.

6. *GARDINER V. CROSSDALE*. H. T. 1760. K. B 2 Burr. 904; S. O. 1 Blac. Rep. 198.

The averment of the amount of the loss is not material; for a total loss may be given in evidence under an al

Action on the case on a policy of insurance. The insurance was made upon one-fourth part of the ship *Encouragement* and of its cargo, from Greenland to London, free from average under a certain value. The plaintiff declared upon a total loss of the ship, the declarations expressly stated a total loss, and the damages were made for a total loss; but the evidence only proved an average or partial loss; it was not attempted to prove a total one; and it was only shown that the ship had received some damage, which a little

* See 2 M. & S. 172,

more than 50*l* would have repaired. The defendant's counsel objected at the trial that this evidence did not support the plaintiff's declaration. They also represented the practice to have been on their side; namely, that proof of a partial loss was not sufficient to maintain a declaration for a total loss. A verdict was taken for 20*l*. as for an average loss; but it was agreed on both sides that the verdict should be subject to the opinion of the Court, whether it was maintainable in point of law? If the Court should be of opinion that it was, the verdict was to stand; but if the Court should be of a contrary opinion, the plaintiff was to have a judgment of nonsuit against him. [555]

Lord Mansfield. At the trial it appeared to me, and so the jury thought, that the present case could not be considered as a total loss. The defendant's counsel objected, as they do now, that the jury could not take a partial loss into their consideration upon an express declaration for a total loss; and I understood from them that the practice supported their objection. The counsel for the plaintiff at the trial then argued to the contrary, upon principles, and he also cited the case of *Walker v. Royal Exchange Assurance Company*; but that case does not prove much, for that was a total loss. I was satisfied upon the principles, provided the practice did not interfere with them, which I was then told it did. I chose to put it into such a shape, that the opinion of the Court might be had without delay or expense. No hardship was done to the defendant upon the quantum of the damages found; for the plaintiff took a great deal less than it clearly appeared on the evidence that the loss amounted to. I cannot hear of any such determination as can support the objection that has been made by the defendant's counsel. Therefore it stands singly upon principles, and upon principles it is extremely clear that the plaintiff may upon this declaration recover damages as for a partial loss. This is an action upon the case, which is a liberal action, and a plaintiff may recover less than the grounds of his declaration support, though not more. This is agreeable to justice and consistent with his demand. There are two grounds of the plaintiff's declaration, viz. the policy, and the damage to the ship. As to its being total or a partial loss, that is the question more applicable to the quantum of the damages than to the ground of the action. The ground of the action is the same, whether the loss be partial or total; both are perils within the policy. As to the defendant's not coming prepared to defend a partial loss, this indeed would be an objection if true. But the defendant does in truth come prepared to show that either no damage had happened at all, or at least that damages have not happened to such a degree as the plaintiff alleged in his declaration, or that he did not sign the policy. As to the effects of judgment by default, the defendant could not have been hurt by a judgment by default; for the plaintiff could not have recovered, even upon a writ of inquiry, any greater damages than he could prove to the jury sworn to assess them that he actually suffered. If the present objection were to prevail, it would introduce the addition of unnecessary counts in declarations, and an enormous swelling of the records of the Court. It is more convenient to lay the case short than prolix. There is no proof of any practice contrary to the principles. It was the apprehension of such contrary practice that was the only occasion of my having any doubt at the trial. I am now fully satisfied that the plaintiff may recover either the whole or less than he has laid; and, therefore, this verdict ought in my opinion to stand. In an ejectment for more, the plaintiff may recover less; it is every day's practice. 7. *CARY v. KING*. H. T. 1736. K. B. Hardw. 304. S. P. *FULLER v. GLOVER*. H. T. 1800. K. B. 12 East, 124. [556]

In an action on a policy of insurance, for insuring goods on board the ship *A.*, the plaintiff declares that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. The evidence was, that many of the goods were spoiled, but some were saved; and the question was whether the plaintiff might give in evidence the expense of salvage, that not being particularly laid as a breach of the policy in the declaration? So, the plaintiff may give in evidence any damage that is within the

Lord Hardwicke, C. J. I think they may give it in evidence, for the insurance is against all accidents. The accident laid in this declaration is; that

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its being
specially a
verred.

the ship sank in the river; it goes on, and says that by reason thereof the goods were spoiled; that is the only special damage laid; yet it is but the common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage that is within his cause of action as laid. And though it was objected, that such a breach of the policy should be laid, as the insurer may have notice to defend it; it is so in this case; for they have laid the accident, which is sufficient notice, because it must necessarily follow that some damage did happen.

8. TOULMAN v. ANDERSON. E. T. 1808. C. P. 1 Taunt. 227.

A loss by
barratry is
well alleg-
ed, though
the proof is
that it hap-
pened by
the act of
an enemy
and by bar-
ratry joint-
ly.

This case arose upon a contract of insurance. The policy was upon a voyage from the Cape of Good Hope to Buenos Ayres. The declaration alleges that the loss has been occasioned by the barratry of the mariners. The loss being clearly proved to have happened, and all the evidence having been produced which is necessary to entitle the plaintiff to recover, and the jury being of opinion upon the facts that he ought to recover, several objections having been made for the purpose of setting aside their verdict, and entering a nonsuit. *Per Cur.* First, much stress has been laid on the taking on board of three Spanish prisoners of war, who were on their parol, and who, as it appears, were taken on board by the permission of the governor then residing at the Cape, and for the purpose of being delivered up to the English commander-in-chief in South America, in order to be exchanged for English prisoners. The foundation of this objection is, that the taking these prisoners on board altered the risk of the underwriters, and consequently put an end to the contract of insurance; but as to this, we have no medium through which we can form a judgment of what might be expected, or what was likely to be the consequence. In many cases the taking three such persons on board might be of great use. It is much the practice for vessels to approach an enemy's coast with a prisoner or two on board under a pretended flag of truce. It was suspected that these prisoners were the authors of the mutiny, but it was not proved. As it is not shown that the giving a passage to these persons must necessarily increase the risk, we can form no judgment on this head. The question was properly left to the jury, and they thought that the risk was not thereby increased; the objection, therefore, can have no weight here.

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(f) *Defence and pleas.**

1. GOLDSCHMIDT v. MARRYAT. M. T. 1808. K. B. 1 Campb. 562.

In an ac-
tion on a
policy of in-
surance, an
order may
be obtained
for the in-
spection,
&c. of all
papers in
the posses-
sion of the
insured rel-
ative to the
alleged
loss;

Action on a policy of insurance. In the course of the discussion it was stated, on the part of the defendants, that they had applied to Mr. Justice Heath, for an order upon the plaintiff to produce upon affidavit all the papers in his possession concerning the cause, but that the learned judge had refused to make any order, except for the production of specific papers mentioned by the defendant, or generally for all papers without any affidavit.

Sir James Mansfield said: I have great difficulty in believing this statement to be correct. I have made fifty such orders since I became chief Justice of this court. I was, to be sure, a good deal surprised when they were first applied for, as nothing of the sort was known when I practised in the King's Bench. But I consulted the other judges, and found they had become extremely common. I think they have been very properly introduced, as they

* The 19 Geo. 2. c. 37. s. 4. provides, that in all actions brought by the assured upon any policy of assurance, the plaintiff or his attorney shall, within fifteen days after he shall be required so to do, in writing, by himself or his attorney, declare in writing what sum or sums he hath assured or caused to be assured in the whole, and what sums he hath borrowed at *respondentia* or *bottomree* for the voyage or any part of the voyage in question, in such suit or action.

The pleading to be adopted must depend upon the form of action, by which legal effect is endeavoured to be given by the policy. If *assumpsit* has been brought, the general issue *non assumpsit*, suffices; as under it almost all matters of defence may be given in evidence. But if the policy be under real, and debt or covenant be brought, the plea must be special, stating the ground of reference, unless the action be constituted against the Royal Exchange or London Insurance Companies, who are entitled by the 11 Geo. 1. c. 20 s. 42. to plead on debt that they owe nothing to the plaintiff or plaintiffs; or in covenant, that they have not broke the covenant.

often obviate the necessity of going into a court of equity, and save a great deal of delay, expense and litigation. Without requiring the plaintiff to produce the papers on affidavit, the order would be nugatory. He would only select such as could be of no use to the opposite party. Nor would it answer to limit the order to such papers as are specifically named; since there may be others which the party has not the means of describing, and which may be got at through the medium of a court of equity. I cannot believe therefore, that my brother Heath refused to make an order on the plaintiff to produce upon oath all the papers in his possession concerning the cause now at issue.

2. CLIFFORD v. TAYLOR. H. T. 1808. C. P. 1 Taunt. 167.

Rule to show cause why the defendant should have a week's time to plead after the delivery to him of certain policies, letters, and papers mentioned in his affidavit. Mansfield, C. J. It would be convenient if the plaintiff were required to verify on oath in the first instance, that the papers delivered are all the papers he has. The practice of compelling the delivery of copies of very convenient, for it saves the delay and expense of a bill in equity. But the practice in Chancery invariably is, that a party is entitled only to extracts of letters, if the other party will swear that the passages extracted are the only parts which relate to the subject-matter. Without staying the proceedings, let the defendant take out a summons in the most general terms, require the production of all papers, and if he is not content with such as are thereupon given him, the plaintiff must make a special affidavit, denying the relevancy of the parts withheld.

3. HIBBERT v. MASTERS. M. T. 1808. N. P. 1 Campb. 539.

The declaration laid the loss to have been by the barratry of the master.—Plea, *non assumpti*, and *actio non accrevit infra sex annos*. Lord Ellenborough expressed himself of opinion that the cause of action did not accrue, as the loss did not happen till the master had divested himself of the possession of the ship by delivering her up to the purchasers; 1 T. R. 252. The jury, however, agreeable to my lord's direction upon the merits, found that no barratry had been committed, the acts of the captain being necessary from the unseaworthiness of the ship; and the defendant had a verdict.

4. GRANT v. ROYAL EXCHANGE ASSURANCE COMPANY. M. T. 1816. K. B. 5 M. & S. 439.

Plaintiff declared in covenant for a total loss on a policy of assurance effected in his own name and averred the interest in one count to be in himself, and in another in himself and others; to which defendants pleaded that a less sum was due on the policy than for a total loss, and set-off monies due to them on plaintiff's bond, which was made to them before they had notice that any other than plaintiff was interested in the policy.

Per Cur. On neither of the grounds that have been taken in argument, as it appears to us, is this set-off maintainable. The plaintiff, in the first count of his declaration, claims the whole amount of the policy. The defendant, by his plea to this count, answers, that only part of this sum is due. But what liquidation has there been of the loss? The question must go to a jury to ascertain the quantum of loss. The defendants assume to cut down the demand according to their own estimate of it. Why is the plaintiff obliged to abide by this liquidation? It seems to us, therefore, that this is a case of unliquidated damages. And on the other point, as the policy embraces several interests, there is no mutuality between the policy and the obligation made to the defendants.

(g) *Payment of money into court.*

1. ANDREWS v. PALSGROVE. H. T. 1808. K. B. 9 East, 325. S. P. DYER v. ASHTON. M. T. 1822. K. B. 1 B. & C. 3

Special count on a policy. The risk was stated to continue until the ship was unloaded. There were also the usual common counts. The Court held that the premium having been paid into court generally was an admission of the contract stated in the count, and that it was not competent to the defendant to count on a show that the policy, by which the risk was originally made to cease after the policy of is

But under such an order, it is sufficient to give extracts of those parts of the papers, &c. which are relevant to the subject.

The statute of limitations may be pleaded where the loss accrued within six years before the commencement of the action.

A set-off cannot in general, be pleaded to an action on a policy.

When the defendant paid money into court generally, upon a declaration containing a count for a sum of money, it is an admission of the contract stated in the count, and that it was not competent to the defendant to count on a show that the policy, by which the risk was originally made to cease after the policy of is

insurance with the money counts, the Court of K. B. held this was an admission of the policy stated in the special count; But the Court of C. P. refused to allow the payment to have such effect where the question to

ship was moored twenty four hours in safety, was afterwards altered by the broker without the defendants knowledge. But the defendant having afterwards obtained a rule to amend the rule for paying money into court, by confining it to the money counts, and for a new trial on payment of costs, and the plaintiff thereupon determining to take the money out of court, and not to proceed further, is entitled to all the costs of the action, and not merely to the usual costs of a new trial.

2. MULLER v. HARTSHORN. M. T. 1803. C. P. 3 B. & P. 556.

The defendant paid money into court generally upon a declaration containing a count on a policy of insurance, together with the money counts: and it appeared that the plaintiff, by his conduct previous to the trial, induced the defendant to believe that the only point to be tried was a question of fraud, and suffered him to prepare his evidence accordingly. The Court will not allow the plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by the payment of money into court.

3. MELLISH v. ALLINUTT. M. T. 1813. K. B. 2 M. & S. 106.

Policy of assurance on goods at and from G. to the ship's port of discharge, beginning the adventure on the said goods from the loading thereof aboard the said ship. *Per Cur.* A question arises on the effect of paying money into the court generally. It is said, that money having been paid into court generally, impliedly admits the cause of action on every count. But we think that it is only evidence from which a conclusion of facts may be drawn, but that this finding cannot be considered as an allegation of the fact. The effect of paying money into court may depend on the terms of the rule under which it is paid in. How is the Court to Judge of that effect, if the rule be not set out? and if set out in terms, still it would be only evidence, and the jury should have drawn the conclusion, it would not amount to more than an admission that the party had entered into the contract, still leaving him at liberty to contend that he was not liable beyond the amount of such payment for goods which were not loaded according to the terms of the policy.

4. COX v. PARRY. M. T. 1786. K. B. 1 T. R. 464. RIBBONS v. PRICHETT. E. T. 1798. C. P. 1 B. & P. 264.

Action on a policy of insurance. A verdict having been found for the plaintiff, a new trial was moved for on the grounds that this was a verdict against evidence, and that upon the construction of the 25 Geo. 3. c. 44. the plaintiff could not support this action in point, of law, the name of Shultz not being inserted in the policy. *Per Cur.* The question is, whether upon this contract the plaintiffs are entitled to recover, in order to ascertain that it is incumbent on the Court to examine and expound what the contract is. At the time it was made it could only be on goods, as an insurance on the goods which belonged to De Simons; it is made in his name; it is a good and valid contract as far as it respects his goods, but is void as to all others; and the plaintiffs shall never be admitted to say that this contract, though apparently legal, is in fact illegal, as being made for their benefit; and yet they mean to avail themselves of that illegality, and to recover damages upon it. Besides this, we think that, independent of the objections in point of law, the verdict is not supported by any fact of the evidence. The broker's evidence does not by any means prove that Shultz did not intend to make distinct policies upon the distinct goods shipped in his own name and that of De Simons. On the contrary, the making of two policies, each according to the value of the goods which were shipped in their respective names, and the purposes for which that was done, namely, to lodge one in the hands of Shultz and the other in the hands of De Simons; and the impossibility that they should by law take effect in any other way than as specific policies on the specific goods, which we are bound

* So if a declaration allege a total loss and a stranding, a payment of money into court does not admit the various causes stated, but the plaintiff must prove to which of them the loss was attributable; see *Evereth v. Bell*, 7 Taunt. 450; *S. C.* 1 Moore, 158; *S. P.* *Staford v. Clark*, 2 Bing. 377.

And a payment of money into court on a policy on goods, beginning the adventure from the loading thereof, does not preclude the underwriter from showing that the goods were laden at the place mentioned in the policy.

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Nor is the defendant precluded from objecting to the legality of the contract.

to presume Shultz knew, are unanswerable proofs that he intended that the policies should have the effect which the law gives them. On the whole we are of opinion that this is a verdict, both against law and against evidence, and therefore must be set aside.

(h) *Consolidation rule.*

1. *HODSON v. RICHARDSON*. E. T. 1764. K. B. 3 Burr. 1477.

Several insurance causes were standing upon the same circumstances and it was agreed "that all should be bound by the verdict given in one;" and a verdict was given in that case for the plaintiff. But the defendant gave notice of a motion for a new trial, which he afterwards obtained. It was moved on behalf of the plaintiff in the other causes, that the respective defendants should pay their money to the plaintiff pursuant to their agreement, he having obtained a verdict in the cause already tried. But the Court were clearly and unanimously of opinion that a consent "to be bound by a verdict, in one of many causes upon the same question," means such a verdict as the Court thinks ought to stand as a final determination of the matter. That in the present case a material circumstance was concealed from the insurer by the insured; and therefore, the whole contract was void, and there ought to be a new trial; and the Court had made a rule for that purpose.

The verdict referred to in the consolidation rule means a satisfactory verdict to the Court.*

2. *BURSTALL v. HORNER*. T. T. 1797. K. B. 7 T. R. 372.

This was one of twelve actions on a policy of insurance. The several defendants obtained rules for leave to pay money into court on one count in the declaration for money had and received (being a return of the premium), which the plaintiff's attorneys took out of the court in all the actions; but they did not then tax the plaintiff's costs in either of them. Afterwards the consolidation rule was obtained, expressing in the usual language, "upon the submission of the defendants in the twelve actions to be bound by such verdict as shall be found in the first mentioned action, &c." The plaintiff was nonsuited in the cause that was tried; and the Master, in his taxation of costs, allowed to the plaintiff in all the actions up to the time when the money was paid into court. The Court thought that, according to the fair construction of the consolidation rule, the plaintiff was bound as well as the defendants; and that as there was a nonsuit in the action that was tried, it was conclusive in all the other actions, and that the plaintiff could not deprive the defendant of the costs in any of them, even up to the time when the money was paid into court.

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The consolidation rule is as binding on the plaintiff as defendant; and if the plaintiff in K. B. be nonsuited after payment of money into court, he is not entitled to costs in any of them up to the time of paying the money into court;

3. *MULLER v. HARTSHORN*. M. T. 1803. C. P. 3 B. & P. 556.

Eight actions have been commenced respecting the same risk, four upon one policy, which were consolidated by one rule, and four upon another policy, which were consolidated by another rule; but both consolidation rules

But a different rule holds in C. P.†

* In an action upon a policy of insurance against several underwriters, the Court of King's Bench, by consent of the plaintiff, will make a rule, on the application of the defendants, which is called the consolidation rule, for staying the proceedings in all the actions but one. Upon the defendants undertaking to be bound by the verdict in that action, and to pay the amount of their several subscriptions and costs, a verdict shall be given therein for the plaintiff; see Tidd. 7th Edit. 637. In the Common Pleas there is no rule of court; but a judge's order is obtained for consolidating actions. If the plaintiff will not give his consent to this rule or order, the Courts have the power of granting imparlance in all the actions but one, till the plaintiff has an opportunity of proceeding to trial in that action. On the other hand, if the plaintiff consent, the Courts will oblige the defendants to submit to reasonable terms, such as admitting the policy (and, perhaps, if need be, the interest, or any other matter about which no question is raised), producing and giving copies of books and papers, and undertaking not to file a bill in equity, or bring a writ of error; see Tidd. 636. And if the defendants be not bound to refrain from bringing a writ of error, and a writ of error be issued in the cause tried, which is no stay of execution for want of bail in error being put in, still the other defendants will not be precluded from issuing writs of error in the other action, and putting in bail in error so as to stay execution against themselves; 2 N. R. 430. So when a writ of error is brought by leave of the Court, the Court will stay execution in another action, till the judgment of the court of error is known, upon reasonable terms; see 1 Moore, 79.

† And in that court, if a verdict be given in favour of the plaintiff to the satisfaction of the judge who tried the cause, the plaintiff may proceed to tax his costs on the verdict, and get the defendant's attorney to attend the prothonotary's, who will tax the costs in the other actions, and if the debt and costs are not paid, the Court should be moved on af-

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were entered into previous to the payment of money into court. One cause under each rule was set down for trial; and after the present cause had been tried, the plaintiff withdrew the second in the other. In taxing the costs, the prothonotary allowed to the plaintiff the costs of the three short causes which depended on the event of this cause up to the time of paying the money into court; and in taxing the costs of the commission, which by the rule had been made to abide the event of the trial, refused to allow the defendant the expenses of taking the examination at Hamburg, or of bringing witnesses from Lubeck to Hamburg, to be examined under the commission, only allowing the costs of the commission. In consequence of this, a rule nisi was obtained for the prothonotary to review his taxation, in support of which, as to the first point, the case of *Burstall v. Horner*, 7 T. R. 372. was relied upon, where the Court of King's Bench held that, by the fair construction of the consolidation rule, the plaintiff was bound as well as the defendant; and that as a nonsuit in one action was conclusive in all the other, the plaintiff was not entitled to costs in any of them, even up to the time of the money being paid into court; and it was intimated that the case of *Weston v. Place*, 2 B. & P. 56, where a contrary practice had been stated by the prothonotary and adopted by the Court, was founded on a mistake. But on this point the Court were of opinion with the prothonotary, thinking the practice of this court more reasonable than that of the King's Bench, for that the defendant by paying money into court admitted that the plaintiff was right to that amount; and that the plaintiff, therefore, ought not to be deprived of those costs which he had been led into by the defendant.

(i) *Evidence.*1st. *Of the policy duty.**

On the production of the policy, it may be shown that it was not stamped when effected, altho' it may appear to be so when produced at the trial. Secondary evidence of the policy may be received after [563] showing it to have been lost.

1. *RODERICK v. HAVILL.* M. T. 1811. N. P. 3 Campb. 103.

In a former action for the same cause, it appeared that the policy had not the proper stamp, and the plaintiff was nonsuited. Since then the commissioners of stamps had permitted the proper stamp to be affixed to it on the payment of a penalty. It was for the defendant insisted that the commissioners had no power to do so, and that the instrument was still a nullity. The counsel relied upon 35 Geo. 3. c. 63. s. 16. Lord Ellenborough said the statute was imperative upon him; and that as the policy was not duly stamped before it was effected, the broker could not recover any thing for effecting it.

2. *WILLIAMS v. YOUNGHUSBAND.* M. T. 1815. K. B. 1 Stark. 139. S. P.*BREWSTER v. SEWILL.* M. T. 1818 K. B. 3 B. & A. 299.

Policies of insurance having been delivered to the assignees of a bankrupt, one of whom was since dead; on proof of an application to the solicitor under the commission of such policies, who did not know what had become of them.

Lord Ellenborough was of opinion that this was not such evidence of loss as warranted the admission of secondary evidence.

For the plaintiffs it was then contended, that it was unnecessary to give in evidence, either the policies, or to supply their place by secondary evidence, since their contents were not wanted.

Lord Ellenborough. But you want to show the existence of the policies, and this must be proved by their production.

2nd. *Execution or signing of the policy.†*

Adavit of the facts, for leave to enter up judgment, and take out execution; see *H. Blas*. 217; 5 Taunt. 165; 1 Moore 79; Tidd. 7th Edit. 637. If the Court think fit to open a consolidation rule, and try a second cause, they will extend to the second trial all those terms necessary for the attainment of justice which they imposed on the first trial; such for instance, as obliging the underwriters to consent that the deposition of the captain should be read in evidence; see 5 Taunt. 165; Id. 607.

* The policy must be produced, or its absence legally accounted for, before secondary evidence of its contents can be admitted.

† It must be shown that the defendant subscribed the policy himself, by proving his handwriting; or, if it be effected by an agent, his authority to enter into the contract must be established in evidence. When the policy is attested by a subscribing witness, the witness must be produced.

1. **NEALE v. IRVING.** M. T. 1793. N. P. 1 Esp. 61. **HAUGHTON v. EWBANK.** Proof that the agent had been in the habit of subscribing policies in the name of the defendant with his knowledge; but

Action was brought upon a policy, in which the policy was subscribed by one Hutchins, for the defendant. The witness said he did not know by what authority, but that Hutchins was in the constant habit of subscribing policies for the defendant, and had done several for the witness, and for the others to his knowledge. It was objected that Hutchins might have done this by some limited power of attorney, which ought therefore to be produced; but Lord Kenyon overruled the objection, being of opinion that the acts of Hutchins held him out to the world as properly authorised, and his having subscribed several policies was sufficient to charge the defendant, who, and not the plaintiff, ought to prove his authority to be limited. See 1 Campb. 43.

2. **HOUGHTON v. EWBANK.** M. T. 1814. K. B. 4 Campb. 88. In an action on a policy of insurance, subscribed by the defendant's agent, under a power of attorney, it was objected that the authority, being in writing, ought to be produced. Lord Ellenborough, however, held that the agency was sufficiently established by the defendant's general recognition of policies subscribed in the same manner as the present, as by paying losses upon, &c. proof of the agency.

3. **BELL v. JONSON.** H. T. 1813. K. B. 1 M. & S. 201. **ARCONGLO v. THOMPSON.** H. T. 1811. N. P. 2 Campb. 620. When the declaration contains an averment that the plaintiffs were the persons residing in Great Britain who received the order for and effected the policy, proof must be produced which corresponds with that averment.

The plaintiffs declared on a policy of assurance, and averred that they were the persons residing in Great Britain who received the order for and effected the insurance. The Court considered this as a material averment, and not sustained by evidence of a letter received by them after the policy was effected directing to make assurance; although the policy was originally on goods on board the Anne, or ships, or by whatsoever other name the ship should be named; and the plaintiffs, upon the receipt of the letter, procured a memorandum to be made on the policy signed by the defendant, declaring the interest to be on board the Herald, the ship mentioned in the letter.

4. **DICKSON v. LODGE.** H. T. 1816. N. P. 1 Stark. 226. [564] An allegation that the policy was effected for the plaintiff by the plaintiff, and that the plaintiff, having now closed his case, was precluded from going into further evidence. But upon its appearing that the defendant A., B., and C., is satisfied by proof that it was effected by the firm of A. and B., there being in fact, two firms which had two members in common.

In an action on a policy on goods, the bill of lading, signed by the captain, was produced, to prove the plaintiff's interest in the goods. It was objected, that it had not been proved as alleged, both in the policy and in the declaration, that the policy had been effected by Gray, Wilson, and Co., as the agents of the plaintiff, and that the plaintiff, having now closed his case, was precluded from going into further evidence. But upon its appearing that the defendant A., B., and C., is satisfied by proof that it was effected by the firm of A. and B., there being in fact, two firms which had two members in common.

- 3rd. *Proof of interest.*

1. **AMERY v. ROGERS.** M. T. 1794. N. P. 1 Esp. 208. **ROBERTSON v. FRENCH.** T. T. 1803. K. B. 4 East, 130. **MONK v. ROBINSON.** M. T. 1802. N. P. 4 Esp. 98.

Insurance on the ship Dart, from St. Kitts to London, on which the defendant had underwritten 200*l*. The plaintiff had written from St. Kitts to his agent in London, to effect a policy on ship and cargo to the amount of 5,500*l*. calculating the ship at 1,500*l*. of the sum. No goods were ever loaded on board. Lord Kenyon, though he at first doubted, afterwards adopted the rule which the special jury assured him was established at Lloyd's coffee-house for settling losses of this kind, namely, that as the policy on the cargo never attached, the assured was only entitled to recover such a proportion of the sum as which the defendant underwrote as the property on which the policy attached bore to the whole.

2. **PINE v. ANDERSON.** M. T. 1812. C. P. 4 Taunt. 652. 1 Stark. 180. **S. P. FRASER v. HOPKINS.** T. T. 1809. C. P. 2 Taunt. 5; S. C. 2 Campb. 170. A ship's registry is

Action upon a policy of insurance. It appeared that the ship had been lost; not evi

dence for
the insured
in an action
on a policy.

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and in order to prove the interest as averred, the plaintiff called the registrar of the port of London, who produced in evidence the original register of the ship, which, in consequence of the loss, had been deposited at the Custom House, in pursuance of the stat. 26 Geo. 3. c. 60. It purported to be made upon the oaths of Crawford, Kern, and Carnfoot, all of Greenock, as having all taken and subscribed the oath required by the stat. 26 Geo. 3. c. 60. and as having sworn that they were the sole owners of the ship *Ann*, of Greenock. But the affidavit upon which this registry purported to be made was not produced; so that there was no other evidence of these persons having sworn they were owners than this instrument stating that they had so sworn. The register being objected to, as not constituting even *prima facie* evidence that those persons were the owners of the vessel, the plaintiff tried to strengthen his case by proving the exercise of acts of ownership by the partners interested; but it amounted to no more than this, that Carnfoot had gone to the ship's broker to talk with him about stopping the cargo, as security for the freight, which, as Gibbs, J., upon discussing the rule for a new trial, observed, not being followed up by any act, amounted to nothing; and that Carnfoot had given instructions for inserting the names of all the three as owners in the bond required by the register act. The jury found a verdict for the plaintiff, Mansfield, C. J. reserving the point, whether this certificate of registry were admissible as evidence. See 6 Geo. 4. 100.

3. *MONK v. ROBINSON*. H. T. 1802. N. P. 4 Esp. 98. S. P. *CAMDEN v. ANDERSON*. T. T. 1794. K. B. 5 T. R. 709.

But a certificate of registry affords conclusive evidence that a person not named therein is not owner.

This was an action of *assumpsit* on a policy of insurance, on the ship *Speculation*, from Ipswich to Chester. Loss by capture. The defence was, that the interest was not truly averred to be in the plaintiff. The policy was effected in the names of Elizabeth Marsh and son; the action was brought in the name of the son only; and the first objection arose on the face of the policy itself. It appeared however, by the pleadings, that there was an averment in the declaration that the plaintiff was solely interested. Le Blanc, J., was of opinion, that this averment let the plaintiff in to prove a sole interest in himself, notwithstanding the policy bore the joint names of two. The defendant's counsel stated that the evidence he had to offer was that of the registry from the Custom House, by which it would appear that on the 31st of October, 1800, when the insurance was made, the ship stood registered at the Custom House as belonging to Cummins, M'Master, and Co., and that there was no change in the registry till March, 1801, when the present one to the plaintiff was made. Le Blanc, J. I think, this is conclusive evidence. By Lord Liverpool's act, Geo. 3. where there is any change in the ownership, there must be an indorsement on the certificate of registry, accompanied by the oath of the parties. In the case of *Camden v. Anderson*, 5 Term. Rep. 709. one of the persons who was part owner was held not to have an insurable interest for want of the register. That therefore is the legal evidence of ownership; and as it appears in this case that at the time of the underwriting the policy the plaintiff was not an owner standing in the registry, I think he had not an insurable interest, and must be called.

4. *TEED v. MARTIN*. M. T. 1814. N. P. 4 Cambp. 90.

When the interest in the ship is claimed in pursuance of a bill of sale or other writing, and the insured do not rely upon possession, the bill of sale or other document must be proved.

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To prove that the defendant Martin was an owner, the plaintiffs counsel at first relied upon an entry in the register-book from the Custom House in the port of London, stating that the certificate had been granted upon an affidavit by Martin, swearing that he was an owner. It was admitted that all the affidavits on which registers were granted had been burnt in the late fire at the Custom House, and it was contended that this entry in the register-book was secondary evidence of the affidavit; but Mr. Sentance, who produced the book, had not made the entry. Lord Ellenborough. It is allowed that the defendant can only be fixed as owner through the medium of the affidavit. That document cannot be produced, and secondary evidence of its contents is receivable. But the register-book is not sufficient for this purpose; you must call the collector's clerk, or some person who has seen the affidavit, and know that it was made by the party sought to be charged.

5. **WOODWARD v. LOCKING.** H. T. 1801. N. P. 3 Esp. 286.

The defence was, that M'Connel was the real owner, and Woodward the captain; that M'Connel was possessed of the grand bill of sale, by a purchase under a condemnation at Boulogne; and that he had paid for the repairs, &c., and appointed Woodward as his captain. To prove this, they produced a French bill of sale, by which it was assigned to M'Connell. This was proved to be done by a notarial act; under seal, which was produced, and a copy of the original act. This was objected to as not being evidence, it not being an examined copy, nor proved to be subscribed by the parties. It was proved, in answer, that the usage was to lodge the original instrument with the officer, and that the notary made out a copy, which he delivered out, and which was the instrument produced. Lord Eldon said it was sufficient evidence, the original being always retained, and a copy issued by a person having power, by the law of France to authenticate the instrument.

6. **RITCHIE v. St. BARRE.** E. T. 1813. C. P. 4 Taunt. 768.

The plaintiff averred that he was at the time of effecting the insurance, and from thence until the 19th day of December, 1810 interested in the said ship to the amount of all the money insured thereon; and that he the plaintiff, together with one Edmund Maude, were then and there, to wit, on the day last aforementioned said, and from thence until and at the time of the loss, interested to the like amount. The loss was proved by a condemnation under the American non-intercourse act. As to the interest, the evidence was, that on the 7th day of December, 1810, the plaintiff, who before that day had been the sole owner, executed a bill of sale of a certain proportion of the ship *Little Sally*, then at disapproved sea, to E. Maude; but that the registration was not completed until the 19th of that month. For the defendant it was objected, that the allegation was not proved; that the plaintiff was solely interested from the 11th to the 19th of December; for that after the registration was completed, the title of Maude had a relation back to the day of executing the bill of sale, and that the plaintiff must therefore be nonsuited. The jury, however, found a verdict for the plaintiff. *Per Cur.* There is an authority in the Court of King's Bench, [567] *Moss v. Charnock*, 2 East. 392. that there is no title in a purchase till the documents are completed. There is a case of *Hubbard v. Johnstone* (3 Taunt. 209), in which our brother Baron Wood has thrown out a doubt upon the propriety of that decision; but upon a strict technical objection such as this is, we should not be inclined to let in that objection now, when the merits were on the other side.—*See 2 M. & S. 43.*

7. **ROBERTSON v. FRENCH.** T. T. 1803. K. B. 4. East, 130.

In an action upon a policy of insurance, at and from all, any, or every port and place on the coast of Brazil, and after the 17th day of September, to the Cape of Good Hope, upon goods and ship, beginning the adventure from the leading thereof aboard the ship, at all any or every port and place on the coast of Brazil, and from the 17th day of September, 1800, and upon the ship in the same manner. It appeared that the goods, for the loss of which, the plaintiff declared, had been put on board at the Cape.

Per Cur. As to the point, that the ownership alledged was not sufficiently proved, it was proved by the captain (Brooks) in the ordinary way, that the owners by whom, as such, he was appointed and employed, were the persons in whom the ownership is by the declaration averred to be. And though it afterwards appeared by his answers, on cross-examination, that the ownership was derived to those persons under a bill of sale, executed by himself, as attorney to one Lawrence Williams, the former owner, it did not on that account become necessary for the plaintiffs to produce this bill of sale, or the ship's register, or to give any further proof of such being their property, the mere fact of their possession as owners being sufficient *prima facie* evidence of ownership, without the aid of any documentary proof or title deeds on the subject, until such further evidence should be rendered necessary in support of

* A letter written by an agent, describing the ship as his ship, is not conclusive, but is open to explanation; see *Tallock v. Boyd*, Holt, 87.

the *prima facie* case of ownership which they made in consequence of the adducing of some contrary proof on the other side. No such contrary proof was, however, in this case given on the part of the defendant; for the prior register in the name of Lawrence Williams, as owner in 1799, and a subsequent register to the same person, upon a sale at the Cape in 1802, under a decree of the court of Vice-admiralty, and which were given in evidence by the defendant, were perfectly consistent with a title in other persons in the mean time, agreeable to the averment in the declaration.

8. *THELLUSON V. FLETCHER*. H. T. 1788. K. B. 1 Doug. 315.

Where there is a stipulation in a policy on a foreign ship that the policy shall be an efficient proof of interest, and there is judgment by default, the plaintiff in the writ of inquiry need only prove the defendant's subscription, without giving any evidence of the interest.

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The policy was on goods on board three French vessels from St. Domingo to Bordeaux. The material part of it, as to this case, was in the following words: "On all goods loaden, or to be loaden on board the ships *Le Soigneux*, *La Pucelle*, *Le Vainquer*, all or any of them. The said goods and merchandises, by agreement, are and shall be valued at—on twenty-five casks of clayed sugar and twelve hogsheads of Muscovados; the policy to be deemed sufficient proof of interest in case of loss." The first count in the declaration stated that goods to a great amount, being the property of certain foreigners, had been shipped on board *Le Soigneux*, and that she had been lost. The second averred, that the goods were shipped on board the three ships, or some of them, to the amount of the sum insured; and that two of them had been captured and the other lost. This case came before the Court upon a motion to set aside the writ of inquiry, which had been executed before the sheriff, after a judgment by default on this ground, that the jury had assessed the damages to the amount of the defendant's subscription, without any proof of the amount or value, or any evidence whatever except that of the defendant's handwriting to the policy. In addition to this objection an affidavit was produced, tending to show that, in fact, the insured had no interest. It was argued for the defendant, that by the express agreement of the parties, no other proof of interest but the policy was required; and this insurance on foreign ships and property was not within the statute prohibiting such policies; so that the plaintiff was entitled to recover the sum insured by the defendant, even if it could be proved that the insured had no property on board. The Court said that this was not a policy within the statute, foreign ships not having been included in that act, on account of the difficulty of bringing witnesses from abroad to prove the interest. The only difficulty they could have here was from the circumstance of there having been three ships; but the second count was so framed as to make the case the same as if there had been but one.—By suffering judgment to go by default the defendant has confessed the plaintiff's title to recover; and the amount was fixed by the stipulation in the policy.

4th proof of value.

1. *LEWIS V. RUCKER*. E. T. 1761. K. B. 2 Burr. 1171.

Evidence of value must also be given, except in the case of a valued policy, where it is only necessary to prove some interest to take the case out of the objection of an insurance without interest.

This was an action brought upon a policy by the plaintiffs for Mr. James Bordieu, upon the goods on board a ship called the *Vrow Martha*, at and from St. Thomas's Island to Hamburgh; from the loading at St. Thomas's Island until the ship should arrive and land the goods at Hamburgh. The goods (which consisted of sugars, coffee, and indigo,) were valued at 30*l.* per hogshead the clayed sugars at 20*l.* per hogshead the Muscovado sugars, and the coffee and indigo were likewise respectively valued. The sugars were warranted free from average under 5*l.* per cent., and all other goods free from average under 3*l.* per cent., unless general, or the ship be stranded. In the course of the voyage the sea-water got in, and when the ship arrived at Hamburgh, it appeared that every hogshead of sugar was damaged. The damage the sugars had sustained made it necessary to sell them immediately, and they were accordingly sold; and the difference between the price which they brought by reason of the damage, and that which they might then have been sold for at Hamburgh if they had been sound, was as 20*l.* 0*s.* 8*d.* per hogshead is to 23*l.* 7*s.* 8*d.* per hogshead, i. e. if they would have been worth 23*l.* 7*s.* 8*d.* per hogshead, as damaged they were only worth 20*l.* 0*s.* 8*d.* per hogshead.

Per Cur. It is settled, "that upon valued policies the merchant need only [569] prove some interest to take it out of 19. G. 2. because the adverse party has admitted the value; and if more was required, the agreed valuation would signify nothing." But if it should come out in proof that a man had insured 2,000*l.* and had interest on board to the value of a cable only, there never has been and we believe there never will be a determination, that, by such an evasion, the act of parliament may be defeated. There are many conveniences from allowing valued policies; but where they are used merely as a cover to a wager, they would be considered as an evasion. The effect of the valuation is only fixing conclusively the prime cost. If it be an open policy, the prime cost must be proved in a valued policy. To argue "that there can be no adjustment of an average loss upon a valued policy," is directly contrary to the very terms of the policy itself. It is expressly subject to average, if the loss upon sugars exceed 5*l.* per cent.; if it was not, the consequence would be, that every partial loss must thereby become total; but the event to entitle the insured to recover would not happen, unless there was a total loss. Consequently, the plaintiffs in this case would not be entitled to recover at all; for there is no colour to say this was a total loss: besides, the plaintiffs have taken the goods and sold them. In opposition to the measure the jury have gone by, the plaintiffs contend, that they ought to be paid the whole value in the policy upon one or two grounds: first, because the general rule of estimating should be the difference between the price the damaged goods sell for, and the prime cost or value in the policy). Here the damaged sold at 20*l.* 0*s.* 8*d.* per hogshead, and the underwriter should make it up 30*l.* Answer: It is impossible this should be the rule; it would involve the underwriter in the rise or fall of the market; it would subject him, in some cases, to pay vastly more than the loss; in others it would deprive the insured of any satisfaction, though there was a loss. For instance, suppose the prime cost or value in the policy 30*l.* per hogshead; the sugars are injured; the price of the best is 20*l.* a hogshead; the price of the damaged is 19*l.* 10*s.*; the loss is about a fortieth, and the insurer would have to pay above a third. Suppose they come to a rising market, and the sound sugars sell for 40*l.* a hogshead, and the damaged for 35*l.*; the loss is an eighth, yet the insured would have to pay nothing. The second ground upon which the plaintiff contends that the 30*l.* should be made up is, that it appears the sugars would have sold for that price if the damage from the seawater had not made an immediate sale necessary. The jury were right in their verdict; we are satisfied that they did right in totally disregarding the particular circumstances of this case.—Rule discharged.

2. *RUSSELL v. BARKERS.* H. T. 1787. K. B. 2 Stra. 1127.

To prove a property in the cargo on an action on a policy of Insurance, the plaintiff produced a bill of parcels of one Gardner, at Petersburg with his receipt to it, and proved his hand. The defendant objected, that this was no evidence against the insurers; but the Chief Justice allowed it.

3. *M'ANDREW v. BALL.* T. T. 1795. N. P. 1 Esp. 373.

Case on a policy of insurance, on the ship *Unity*, from Lisbon to London, and her cargo of oranges, by the plaintiff, as consignee. To prove interest, the plaintiff produced the bill of lading; and the captain, who had been called as witness, was asked if that was his bill of lading, and whether he had the goods on board specified in it? He answered in the affirmative. The counsel put it to Lord Kenyon, Was it sufficient proof of interest? His lordship ruled that it was.

4. *HIBBERT v. CARTER.* E. T. 1787. K. B. 1 T. R. 745. S. P. CALDWELL v. BALL. E. T. 1780. K. B. 2 Id. 205.

The plaintiffs were merchants in London, and the general consignee of Keer was a planter in the island of Jamaica. They were in the constant habit of procuring insurance upon his goods as soon as they received advice of their being shipped. On the 23rd of December, 1782, the plaintiffs received advice from Keer, of his having shipped ten hogsheads of sugar on board the *Devonshire*, in which letter, dated the 18th of October, 1782, was contained a

When the policy is on goods, producing a bill of parcels from the vendor abroad, with a receipt to it, and proof of his hand writing, is sufficient evidence of interest; Or the evidence of the captain that he had the goods on board, and that the bill of lading was signed by him. A bill of lading is evidence of the property in the goods,

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general direction to insure whatever goods were shipped by him. The insurance was immediately effected; but in the month of November, between the time when the order was sent, and the time when the defendant subscribed the policy, Keer had indorsed the bill of lading to one Dellpratt, in Jamaica, to whom there was an arrear of interest due upon mortgage on Keer's estate upon that island. The plaintiffs had notice of this indorsement after the insurance was made, by a letter from Keer to them, wherein he informed them that he had been obliged to assign the bills of lading for the net proceeds to Dellpratt. The bill of lading, as it originally stood, expressed the sugars to be shipped on account and risk of the shipper, and directed the delivery to his order, or that of his assigns; the indorsement was in the following terms:—"Deliver the above sugars to Mr. John Hodgson, for account of S. Dellpratt;" signed "R. Kerr." The ship was lost in the course of the voyage. The plaintiffs rested their case here, and contended that upon these facts they were entitled to a verdict for the amount of the insurance. On the other hand, it was objected, that Kerr having signed the bill of lading before the insurance was actually effected, the averment in the declaration, that these sugars had been insured on his account, was not true; for he had not then any insurable interest remaining in him, the entire property in the goods having passed out of him by the assignment of the bill of lading, which operated in this instance as a payment; and Buller, J., being of this opinion, upon the general ground that the indorsement of a bill of lading passed the whole property, would have nonsuited the plaintiff; but it appearing that the defendants had neglected to pay the premium of twenty guineas into court, the plaintiffs took a verdict for that sum. The Court, however, upon this occasion, were all clearly of opinion that where a bill of lading is taken by a creditor as a security for his debt on his own account, the whole property passes by the delivery, and is to be considered as a satisfaction of the debt *pro tanto*. That the parties were at liberty to vary from the general rule, by entering into any particular agreement between themselves, but that it must be shown in order to take advantage of it. They considered the case of *Caldwell v. Ball* as deciding the general question; and as to the case of *Delany v. Stoddart*, there was an agreement that the policy should be transferred. They therefore refused the rule.

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5. *HADDON v. PARRY*. M. T. 1810. C. P. 8 Taunt. 303.

When it is
not indorsed,
the master
should be produced
or his
handwriting
proved.

A bill of lading was offered in evidence, signed by Lieutenant Lawrence, the commanding officer of his Majesty's schooner the *Rook*, of eight guns and twenty-five men, accompanied with proof of his death and handwriting. In the margin was written "bill of lading for 12,000 dollars, dated 12th August, 1808;" under which were copied the marks of the several chests and their numbers and contents, describing them as containing 2,000 dollars each. The body of the bill of lading, expressed to be shipped in good order by Dollar, Auchie, & Co., in and upon the good schooner called the *Rook*, six boxes, containing 12,000 dollars, being marked and numbered as in the margin, to be delivered at London, the act of God, the King's enemies, fire, and all and every other the dangers of the seas, rivers, and navigation, of whatever nature and kind excepted, unto Messrs. James Auchie and Co., or to their assigns, they paying freight. In witness whereof the master or purser of the said schooner had affirmed to four bills of lading of like tenor. This instrument was signed "Contents unknown. James Lawrence, Lieutenant." The *Rook* was taken on the homeward passage by a very superior force, after a most gallant resistance, in which Lieutenant Lawrence and four-fifths of his crew were slain and the survivors taken prisoners. The plaintiffs produced no other proof of the contents of the chests, nor of interest in James Auchie and Co. In this bill of lading, at the trial, no attention was paid to the protest of the master, signed at the bottom "contents unknown;" but upon the whole effect of the instrument it was contended that it was no proof that the property was put on board, or that it belonged to James Auchie; and the

* The bill of lading, where the master is alive, is not evidence of the shipment of the goods; see *Dickenson v. Lodge*, 1 Stark. 226.

Chief Justice being of that opinion, rejected the evidence and directed a nonsuit. The Court declared that the words "contents unknown," rendered the bill of lading no declaration of what the chests of dollars contained; it was, therefore, no evidence at all, and they discharged the rule.

6. JOHNSON v. WARD. E. T. 1806. N. P. 6 Esp. 47.

To prove the property on board, consisting of three casks of indigo, the plaintiff called a witness, who was a clerk in the Custom House, which contained an account of the ship's cargo. It was explained by the officers to be a paper which is made under the direction of the statute 12 Car. 2. and is a copy of the official papers, which contains an account of the cargo, which has been examined by the searcher; the official papers go with the ship, and the paper produced is kept at the Custom House. It was objected by the defendant's counsel that this was not evidence upon this ground; that either the captain should be called to prove the goods actually on board, or the searcher who actually searched the ship, and found and reported such goods on board, and upon whose report the paper in question was made out. It was not, therefore, the best evidence; besides which, the witness had not copied the paper himself. Chamber, J., ruled it to be admissible, as a paper made by authority of an act of parliament by an officer of the Customs appointed for the purpose, and lodged there as an official document of the ship's cargo.

5th. *Of licence.*†

6th. *Compliance with warranties.*‡

1. THORNTON v. LOVE. T. T. 1815. N. P. 4 Campb. 231.

This was an action on a guarantee of a policy of insurance at and from London to Archangel. Several points arose, but only one of them was finally disposed of at Nisi Prius, viz. whether the onus lay upon the assured to show that the ship sailed with convoy. The defendant's counsel contended that, as the statute 34 Geo. 3. c. 57. expressly requires British ships to sail with convoy, and declares policies of insurance upon them to be void if they do not, it was incumbent upon the assured to show that this condition had been complied with. Lord Ellenborough. As the law requires that the ship should sail with convoy, I will presume that the law was obeyed till the contrary is shown. This principle has been settled in *Williams v. East India Company*, see 3 East, 192. and a variety of other cases.

2. WATSON v. KING. M. T. 1815. N. P. 4 Campb. 275.

To prove that the effort sailed under convoy of the Valiant, that the fleet encountered a storm, and that the Effort parted company, not only the log book of the Valiant, but the captain's official letter at the end of the voyage, produced from the Admiralty, was read in evidence without objection.

3. D'ISRAELI v. JOWETT. M. T. 1795. N. P. 1 Esp. 427.

Action on a policy of insurance. The plaintiff proved that the ship sailed from Leghorn to St. Fureux, in Corsica, and from thence under the convoy of the Alcide man of war to Gibraltar, where she arrived, on the 4th of August. On the 12th she sailed under the convoy of the America, for England; they were put back by contrary winds, and finally sailed on the 16th; she parted with her convoy off Lisbon, and arrived safely in the port of London, where the loss happened while she was unloading. The captain on his cross-examination admitted that during his stay at Gibraltar he had taken in a parcel of goat-skins and some wine. By his manifest, dated at Gibraltar, he had dated his sailing to be on the 16th of August. Upon these facts the defence was

* The production of the bill of lading is not indispensable to prove the shipment of war goods; see *Davis v. Reynolds*, 1 Stark. 115. When the policy is on freight, evidence must be given that the right to freight had attached; see 1 M. & S. 203.

† When it is necessary to prove a licence, the regular document must be produced, if in existence; or, in case of loss, proof of the loss must be adduced, and secondary evidence given of the contents of the instrument; see 8 East, 278; 8 B. & A. 296; 1 Campb. 501.

‡ In an action on a policy on ship at and from Hamburgh, with a warranty that a ship was in port on a given antecedent day, is not satisfied by evidence that she was safe in any other port than Hamburgh; see 1 M. & S. 81. It is incumbent upon the plaintiff to prove the fulfilment of all affirmative warranties.

The shipment may be proved by a copy of an official paper containing an account of the cargo;*

[572] When the ship is warranted to sail with convoy, the compliance with the warranty will be presumed, if that was required by the existing laws; evidence of the laws having been infringed must be adduced by the defendant.

The official letter of the command or of a convoy to the

[573] Admiralty at the end of the voyage is good evidence of the facts stated there respecting the convoy; So is the log-book of a ship of

grounded, which was that the ship was warranted to sail with convoy, and that she sailed on the twelfth of August, whereas it appeared by the manifest that the Nereid had not sailed till the sixteenth. This interval it was contended was taken up in taking in a cargo of goat-skins and wine, and that so the warranty was not complied with. To prove the time of the sailing of the convoy from Gibraltar, the counsel for the defendant produced the log-book of the *America* and the Alcide from the Admiralty, by one of the officers of the Admiralty, where they were lodged. On objection to their admissibility,

Eyre, Chief Justice, said, that he had some difficulties as to the admissibility of this kind of evidence, and wished that the opinion of the Court was taken on it. In the present case there was a difference as to the two ships; the Alcide was then lying at Gibraltar and was not part of the convoy; the entries, therefore on her log-book were only entries of the transactions on board that particular ship, and could not therefore, be admitted in evidence. But his lordship observed that the case of the *America* was different. The captain of the Nereid had stated that he had put himself at Gibraltar under the convoy of the *America*; as the motions of the fleet were therefore to be directed by her, he was of opinion that the log-book of the *America* was evidence, and his lordship admitted it accordingly.

4. *ARCONGELLO v. THOMPSON*. H. T. 1811. N. P. 2 Campb. 620.

Nationality is proved by showing that the vessel carried the flag of that state when free from all danger of capture, and that the captain addressed the consul of such state in a foreign port. [574] To prove the ship to be a Dane the evidence was, that the captain when at Trieste, addressed himself to the Danish consul there; that when he left that port he carried Danish colours; and that when he was brought into Venice he had still the same colours; with the French flag flying over them. It was contended that the acts of the captain were no evidence to show to what country the ship belonged. He might have various reasons for passing as a Dane, although he belonged to one of the belligerent powers; therefore some document should be produced, or some witness called, to prove that the warranty had been complied with. Lord Ellenborough. I think the acts of the captain are *prima facie* evidence for the owner of the goods to show to what nation the ship belonged. The circumstance of the ship carrying Danish colours when she was captured, would have very little weight, as in the moment of danger any strange flag might be hoisted for the purpose of deception; but from the captain having carried Danish colours when he sailed securely from the port of Trieste, and having there addressed himself to the Danish Consul, and conducted himself as the master of a Danish ship would have done, I conceive there is fair ground for the jury to infer that the ship really was Danish, according to the warranty.

7th. *Of loss and its amount.*

1. *KALEN KEMPE v. VIGNE*. T. T. 1786. K. B. 1 T. R. 304.

The loss proved must correspond with the nature of the loss described in the declaration; The plaintiffs were proprietors of the cargo, but not of the ship. It appeared that the ship originally sailed with a cargo on board from Riga, on a voyage to Marseilles, and that an insurance had been effected at Bremen upon the cargo for that voyage, in the course of which she was taken and brought into Falmouth by an English privateer; that sentence of condemnation had been there obtained, which was afterwards reversed upon the prize having been proved to be a neutral ship; but the expenses of procuring that reversal were ordered by the Admiralty Court to be a charge upon the cargo. The plaintiff's agents accordingly paid the sum of 103*l.* 14*s.* for the expenses of reclaiming the ship and cargo, and immediately procured the policy in question to be effected in January, 1781, according to the purport of the memorandum. In the February following the ship set sail from Falmouth with the original cargo on board, in the prosecution of her voyage to Marseilles; but on the 26th of the same month, before her arrival there, was captured by a Spanish ship, and carried into Ceuta, in Spain where she was again condemned.—An appeal was brought in the Suspension Court of Madrid, which, promising to be of long continuance, the cargo, which was of a perishable nature, was ordered to be sold, and the proceeds to be brought into court to wait the event of the suit. In May 1783, the vessel was restored by sentence of the

Court, and the surplus of the proceeds which arose from the sale of the cargo, was paid to the owners, deducting the expenses incurred in Spain in prosecuting the appeal. After all the charges paid, there only remained twenty-six rix-dollars. As soon as the ship was liberated she sailed from Ceuta to Malaga, in order to refit; and having there made the necessary repairs, set sail for Bremen, and in that voyage was lost. The declaration averred, that whilst the ship was proceeding in her said voyage from Falmouth to Marseilles and before she could arrive at Marseilles, she was captured by the Spaniards, and thereby the said ship, and also the goods and merchandizes on board her, were totally lost to the plaintiffs. It was objected, on the part of the defendant: 1st. That this was not an insurable interest. 2ndly. That the plaintiffs could not recover upon the policy in this form of declaring; for they had stated the loss to have happened by capture, whereas though the vessel was captured, yet having been afterwards restored, she might have reached her destined port notwithstanding the capture, in which case the underwriters would have been discharged by the terms of the memorandum.

Per Cur. The answers to this case are decisive. First: this is a wagering policy; and it is just the same as if the event insured had been the arrival of any other ship at Marseilles. The loss or safe arrival of the ship did not alter the security. The parties were interested in the cargo alone; but the event insured was the arrival of the ship, and not of the cargo. A necessary consequence of this being a wagering policy is, that the insured cannot abandon. But even supposing it to be a policy on interest, it is enough to say that in this case the parties never did abandon. In effect there was only a temporary capture; and though, by construction, a temporary capture is such a loss as that an assured upon interest is warranted in abandoning at the time, if he please, yet we must consider what the truth of the case was between these parties. Now, this was a wagering policy; and in such case there can be no abandonment. But what alone is a fatal objection to the plaintiff's claim is, that they did not attempt to pursue the voyage to Marseilles, which it was in their power to do after they left Ceuta. The circumstance of the ship's having been captured, and detained for a time, did not prevent her from prosecuting her voyage after she was liberated; nor is it any excuse that the plaintiffs could no longer control her destination; for in wagering policies the assured takes upon them to perform all that the owners themselves of the vessel could have done in the same situation.

2. *SERRAT V. PORTER.* H. T. 1797. K. B. 7 T. R. 153.

Action on a policy of insurance. When Vaux, the broker, applied to the defendant informing him of the loss and demanding payment, he produced the different papers relating to the subject, and, among the rest, the protest signed by the captain. The defendant told him he had looked into the papers, but that there was a point in the case, and he refused payment. On the part of the defendant it was contended that the protest was made evidence in this case by the plaintiff, as a paper delivered by his agent to the defendant, containing an account of the loss on which he rested his claim, and therefore, that it amounted to a declaration made by the plaintiff to the defendant of the facts on which he required payment. Lord Kenyon was clearly of opinion that the protest was not admissible in evidence and the plaintiff obtained a verdict.

Lord Kenyon, C. J. Great complaints have been made in the commercial world, and not without reason, of the enormous expense attending the trials of insurance causes; it therefore becomes the Court not to suffer that expense to be increased by unnecessary motions, and it was with great reluctance that I was induced to consent to grant the rule to show cause in this case.—I have considered, and re-considered this question, and I cannot figure to my imagination any arguable point in it. That the protest *per se* cannot be evidence is admitted; then what facts were proved to make it evidence in this case? Why, that it was in Vaux's hands, and that he showed it to the defendant on application for payment. But if that circumstance would render the protest evidence, it might equally be argued that the allegation of a plaintiff's

And the best evidence must be adduced; the captain's protest is not sufficient;

bill in enquiry might be read against him, merely because the bill, with its contents, must have been shown to the defendant; but that cannot be pretended. [576] If the plaintiff had availed himself of any part of this paper to prove his case, the defendant would have been entitled to read the whole of it; but the mere circumstance of Vaux's showing the protest to the defendant when he applied to him for payment surely cannot render the protest evidence in this case.

3. *THELLUSON v. SHEDDON.* T. T. 1806. C. P. 2 N. R. 229.

It was proved that the *Mary* sailed from Port Antonio, in Jamaica, on the 1st of May, and was captured on the 12th of the same month; that she was re-captured on the next day (having had her papers and several of her men taken out), and arrived at Port Royal, in Jamaica, on the 16th of May; and that on her arrival there proceedings were instituted in the Admiralty Court; and the shippers of the cargo declining, under legal advice, to appear on behalf of the insured, a sale was ordered by the Court in order to defray the salvage and expenses. The proceedings in the Court of Admiralty were not proved by the plaintiffs, but credit was given to the underwriters for the sum received out of court by the agent of the assured in the island of Jamaica; and the difference only between that sum and the invoice of the cargo was claimed. On the part of the defendant (whose main defence to the action was a supposed fraud in the agents of the assured after the re-capture, and in the sail of the cargo), it was objected, that the plaintiffs could not recover without duly proving the proceedings in the Court of Admiralty. This objection was, however, overruled, and a verdict was found for the plaintiffs, the jury negating the fraud, which constituted the defence.

Sir James Mansfield, C. J. On the part of the defendant the objection is, that the plaintiff goes for a partial loss, the principal part of which consists in salvage, which depends on the proceeding in the Admiralty Court; and it is objected, that neither the salvage (which depends on the Admiralty Court,) nor the expences of the Admiralty Court, can be otherwise proved than by producing the proceedings of that Court. The general rule certainly is, that nothing which depends on the proceedings of a Court can be proved by parol testimony; and it being the duty of the plaintiffs in this case to make out a partial loss, I cannot see upon what principal the necessity of producing the proceedings can be dispensed with. The act of parliament 43 Geo. 3. c. 160. s. 40. expressly requires, in all cases of capture and re-capture, that some proceeding should be had in the Admiralty Court to ascertain what the amount of salvage shall be. The amount, therefore, of the partial loss claimed of the underwriters must depend upon the proceedings of the Court.

4. *CARY v. SMITH.* T. T. 1736. K. B. Ca. Temp. Hard. 306.

Action on a policy of insurance, for insuring goods on board the ship *A*. The plaintiff declares that the ship sprung a leak and sunk in the river, where- by the goods were spoiled; and the evidence was, that many of the goods were spoiled, but some were saved; and the question was, whether the plaintiff might give in evidence the expense of salvage, that not being particularly laid as a breach of the policy in the declaration?

[577] Lord Hardwicke, C. J. I think they may give it in evidence; for the insurance is against all accidents. The accident laid in this declaration is, "that the ship sunk in the river;" it goes on and says, "that by reason, therefore, the goods were spoiled;" that is the only special damage laid; yet it is but the common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage that is within his cause of action as laid; and though it was objected that such a breach of the policy should be laid as the insurer may have notice to defend it, it is so in this case; for they have laid the accident, which is sufficient notice, because it must necessarily follow that some damage did happen.

5. *ABEL v. POTTS.* M. T. 1800. N. P. 3 Esp. 242.

The ship was taken by the French and carried into Guadaloupe, where the colony being in want of her cargo they took it out, and compelled her to take in a cargo of the produce of that island, with which she sailed. She was after-

So salvage payable under the decree of a Court of Admiralty must be proved by regular evidence of the judgment of that Court.

A loss occasioned by the expense of salvage may be given in evidence under a general allegation that the ship was sunk, and the goods spoiled.

An entry in Lloyd's books stating a capture is evi-

wards captured on the 20th of September, 1723, by a British ship, and carried dence of into Nevis, where the cargo was condemned. There was a memorandum on the fact as the policy, that the loss was to be adjusted within three months after advice of against the the ship being captured. The defendant relied on the circumstance that he defendant. had had no notice of the loss of the ship. The broker who effected the poli- a subscriber cy was called; he could prove no direct notice having been given to the de- to Lloyd's; fendant, but said he had no doubt that notice had been given.

Mr. Justice Le Blanc. I think that if the underwriter had notice by any means of the loss of the ship, that that would satisfy the memorandum of the policy. With respect, therefore, to the evidence of notice, it is this: there is evidence that the loss of this ship was publicly known, that she stood on Lloyd's books as a capture, and that the defendant was a subscriber to Lloyd's, and in the habit of daily examining the books. Was the defendant the only underwriter in Lloyd's coffee-house ignorant of the capture? In addition to this, there is the evidence of the broker, who swears that he believes the defendant had notice, though he cannot speak to it in direct terms. I think this evidence sufficient to go to the jury.

6. MARSHALL V. PARKER. H. T. 1809. N. P. 2 Campb. 19.

Action on a policy of insurance. The plaintiff at first satisfied himself with And the sen proving that a cargo of pilchards was put on board the Cupido in Mount's tence of Bay, and putting in a minute of council which directed a licence to be grant- condemna ed for this ship to carry a cargo of pilchards to Leghorn, and a sentence of ship by the the French Admiralty Court, whereby the cargo of the Cupido was adjudged [578] good prize, the captors paying freight to the captain, to whom the vessel was Court of ordered to be restored. Admiralty

Lord Ellenborough. From the licence we may presume that the ship sail- is good evi ed for Leghorn; but certainly the plaintiff has not proved that she was captur- dence of ed on her way thither. You must lay a foundation for the sentence; at pres- the grounds ent it is merely *in vacuo*. Prove a capture, and I will receive sentence of condem nation, but as evidence of the facts on which the condemnation proceeded. not of a capture.

7. EVERITH V. HANNAM. M. T. 1815. C. P. 6 Taunt. 375; S. C. 2 Marsh, 72.

Action on a policy of insurance. The captain of the *Wilhelmina*, on the part As barratry of the plaintiffs, stated that the ship sailed from Aarbuus, in Jutland, with a is in the na cargo of corn, bound for Leith, on the 26th of May, 1814; that he was pursu- ture of a ing his direct course for Leith, as far as the wind and current would permit, loss by bar without any other object or intention; that the current carried him nearer rary can than he intended to Norway, which was then under blockade by the Swedish not be pre government, and that on the 30th of May, the ship being then about five Ger- sumed.* man miles from Abrendahl, on the coast of Norway, was taken by the Swedish frigate *Eurydice*, and carried into Gottenburgh. On the part of the defendant the sentence of condemnation by the Swedish Court of Admiralty was produc- ed, which stated that from the situation in which the *Wilhelmina* was found, it clearly appeared that the captain had endeavoured to enter a port of Norway, and on that ground the condemnation proceeded. It was then contended, for the plaintiffs, that the sentence, if it proved the breach of the blockade, also proved barratry on the part of the captain. It appeared that the ship was bound by the owners for Leith, and that the defendant could not set up as a defence to a loss by seizure, that that seizure was authorized by the barratrous act of the captain, when the same evidence would entitle the plaintiffs to recover as for a barratry. A verdict was found for the plaintiffs; the Chief Justice reserving three points for the consideration of the court: 1st. Whether the sentence was conclusive evidence of the breach of blockade so as to preclude the plaintiffs from recovering? 2nd. Whether the sentence, coupled with the testimony of the captain, that the ship was bound for Leith, were also conclusive evidence of barratry? 3rdly. Whether, if it were, the plaintiffs

* This, however, does not mean that there must be an actual eye-witness to the fact; it may be decided by reasonable evidence of the circumstances; see *Hucks v. Thornthqn*, Holt, 20.

would be entitled to recover on that ground without a count for barratry?

Per Cur. The plaintiffs commenced their case by calling the captain, who stated that he was bound for Leith, that he pursued that course as far as he was able, and that he was taken about five German miles from the coast of Norway by a Swedish frigate; so far the plaintiffs would have been entitled to recover. But then the defendant gave in evidence the sentence of condemnation, by which it appeared that the ship had broken the blockade, and had been condemned on that ground. This being proved, the plaintiffs contended that though the blockade had been violated, yet taking it with the captain's evidence, that the owners had given him instructions to proceed to Leith, the violation must be considered as an act of barratry on his part. Thus much of his evidence they are desirous of receiving, but they wish to reject the rest, as being contradicted by the sentence of condemnation. The Court are accordingly desirous to conclude from the captain's evidence, that his directions [579] were to go to Leith, and from the sentence that he had committed a breach of the blockade, which it was contended was an act of barratry on his part.—Even supposing the law to be as the plaintiff contends, we are of opinion that the evidence did not warrant it, and that it required much more inquiry, even on that principle, to fix the captain with barratry; that cannot be done, unless he act criminally; and to say that he broke the blockade in disobedience to the instructions of his owners for some private interest of his own, is too strong an inference from the evidence as it stands. The ship might have been bound for Leith, and yet might receive directions to touch at Norway, and for other reasons she might have gone thither, without any imputation of barratry. On this ground, therefore, we are of opinion, that the plaintiffs cannot resort to their claim for barratry. We do not decide whether they could or could not have done so on the present declaration, supposing the facts had borne them out; nor whether in an action against the underwriters for the barratry of the master, the sentence of condemnation be so conclusive as to preclude any other evidence from being received to rebut it; we only decide that the facts of this case do not afford sufficient evidence of barratry.

See Cowp. 143; 8 East, 126.

In the case of a supposed loss at sea there must be some evidence of the ship sailing up on the voyage then mentioned in the policy. 8. COHEN V. HINCKLEY. H. T. 1809. N. P. 2 Campb. 51; 1 R. & M. 133. Action on a policy of insurance on the ship Union, at and from Portsmouth to Quebec. The declaration stated, that after the ship set sail from Portsmouth, and before her arrival at Quebec, she was wholly lost by the perils of the sea. As the plaintiff's case was at first shaped, the only evidence of the loss was given by the plaintiff's son, who swore that on the 8th or 9th of May, 1806, he saw the Union at Portsmouth, in Stoke's Bay, going out with other ships for Spithead, and that she had never afterwards been heard of. It was contended that it was the best evidence the nature of the case admitted of, and that the presumption from the facts proved was, that the ship had perished on the voyage to Quebec, and that the policy being "at and from Portsmouth," the loss was covered by it, even supposing that the ship sunk while she lay there.

Lord Ellenborough. Even in that case, you must show she was at Portsmouth, on her voyage insured; but the declaration states, that the loss happened after the ship sailed from Portsmouth to Quebec. You must give some evidence that she sailed from the one place to the other; but when she left Stoke's Bay, how do I know that she was not bound to the East Indies? If you could shew that she had a particular destination by charter-party, I should presume that she sailed on the chartered voyage; or if you could show that she was cleared out for a particular port, I should presume that she set sail for it when she dropped from her moorings. But you have laid no foundation for any presumption upon this subject, either one way or another. The convey bond was then produced which had been executed at the custom-house, by the plaintiff as owner, and Christopher Rowland, as captain of the Union, on the 28th of April, 1806. In the body of this instrument no mention whatever is [580]

* A licence to carry a cargo to the place of destination mentioned in the policy is evidence to this effect; see *Marshall v. Parker*, 2 Campb. 69.

made of the place to which the ship was bound, the parties merely engaging that she should not sail without, nor depart from, convoy without leave; but at the bottom of it these words were written, "Convoy bound for Quebec." An officer from the customs stated that it was according to the course of the office to write these words upon the bond; and that, though he did not personally know of any act of office being done upon it, he had no doubt that a certificate and other papers for a voyage to Quebec were delivered to the captain before he sailed. Lord Ellenborough. I think this is sufficient *prima facie* evidence that the ship sailed on the voyage insured.

9. WALDEN v. COOMBE T. T. 1810. C. P. 3 Taunt. 162.

The plaintiff averred a loss by perils of the sea. The defendant pleaded *The amount of the loss may be shown by a certificate from the vice-consul abroad.* *non assumptum*, and paid into court 50l. per cent. The plaintiff proved that, if the goods had not been damaged, the market would have afforded a profit of 15l. per cent.; that the goods were damaged apparently by sea water to a considerable degree; the witness would not have given 30l. per cent. for them; but the plaintiff gave no other evidence of the manner in which the damage was occasioned. To prove the amount of the loss, a witness produced a certificate from the British vice-consul there, of the amount for which the goods were there sold, being 9l. 15s. per cent. only of the sum insured; and the same witness swore, that by the law of the Brazils and other parts of South America, the vice-consul is constituted general agent for all absent owners of goods; and that the same law authorizes and compels the vice-consul to make sale of all the damaged goods of all absentees, with the assistance of two British merchants as assessors.

Mansfield, C. J. I thought at the trial it was very difficult to bring this within any head of evidence. It was somewhat analogous to the proceedings of courts and other public functionaries; but I know no instance of such as this being received. I dare say it would be evidence in any other country. It came nearest to the case of judgments in foreign courts; but we receive judgments under the seals of the courts. The vice consul is no judicial officer: he acts under a wise regulation to prevent the improper disposition of damaged goods. They are put into warehouses appropriated to them by government. The vice-consul must preside at the auction. There is no rule in the English law which makes his certificate evidence.

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(j) *Witnesses.*

1. AKERS v. THORNTON. M. T. 1795. N. P. 1 Esp. 414.

Assumpsit on a policy of insurance. The underwriters had contested the payment of this loss, on the ground that they had not been informed at the time of their subscribing the policy, that the ship had sailed the 15th of March, as in such case they contended, she would have been underwritten for the common premium. A witness of the name of Wallis, had been the broker who had effected the policy, and swore that he had informed the underwriters of the circumstance of the ship's sailing on the day mentioned. The cause tried immediately before the present was a cause of Akers v. Akers; the same defence had been made, Wallis had given the same testimony, and the jury had found for the plaintiff. The counsel objected to their testimony. He admitted that the case of Burt v. Baker, *infra*, had decided that one underwriter might be a witness in an action on the policy; but contended that this case did not come within the rule established in that. 1st. Because the underwriter did not come merely to prove a question on the policy, but to endeavour, by his evidence, to destroy the credit of Wallis's testimony, 2ndly. That as a verdict had been given in the preceding cause, on the evidence of Wallis, if he was discredited by the verdict of this, the former verdict could not stand, nor any future one be recovered against the underwriters who were now offered as witnesses. Lord Kenyon said, that the case of Burt v. Baker had been decided on such deliberation, and had established the competency of under-

In an action on a policy of insurance, against the insurer, or other underwriters, whose names are on the policy are competent witnesses.

* But a certificate of the agent belonging to Lloyd's, resident in foreign parts, is no evidence to prove the amount of damage which goods sustained by the perils of the sea although the defendant was a subscriber to that institution; see 1 B. & C. 475; 2 D. & R. 306; 3 B. & R. 147.

writers being witnesses on cases respecting policies which they themselves had subscribed; that, though the objection left their interest in a strong point of view, as matter of observation on their credit, yet still, under the authority of that case, he must receive their testimony.

2. *BURT v. BAKER.* H. T. 1789. K. B. 3 T. R. 27.

A broker who underwrites a policy, after getting it subscribed by others, is a competent witness for the defendant in an action against those who underwrote before him.*

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The counsel for the defendant below produced one George Bowden, an insurance broker, as a witness, to prove circumstances tending to show that the underwriters on the same policy were not liable to pay the loss; who, being sworn, said that he was employed as a policy broker by the plaintiffs, to procure the policy of assurance in the declaration mentioned to be subscribed by the defendant and the several other persons whose names are subscribed thereto as assurers; and that he as such policy broker, procured the same to be subscribed by the defendant, as an assurer, for 100*l.*, in such manner as in the declaration is in that behalf mentioned; and that he, within the space of one hour after the said policy had been so subscribed by the defendant and the other persons whose names are subscribed thereto, prior to the witness, subscribed the same policy for the sum of 200*l.*, and became an assurer to the said Peter Baker and John Dawson; and that an action had been commenced against him, at the suit of the plaintiffs, and was then depending in his Majesty's Court of King's Bench at Westminster, as such assurer, for the said 200*l.* for and in respect of the said loss alleged in the declaration; and in which action the same question was depending as in this action against the defendant, and that he expects to contribute to the expense of defending this action against the defendant; and also, that he, together with the defendant and several other underwriters upon the same policy, had filed a bill in equity in the Court of Exchequer against the plaintiffs, for a discovery of divers matters respecting the policy and assurance, for the purpose of avoiding the same, and also praying to be relieved against the same, which bill in equity was then depending in the Court of Exchequer; and thereupon the counsel for the plaintiffs, on behalf of the plaintiffs, did then and there, before the said Chief Justice, object to the admission of the said George Bowden as a witness, and did then and there insist that he was not a competent witness on behalf of the said defendant upon the issue joined between the said parties. Whereupon the said defendant and his attorney produced a release duly executed by them to the said George Bowden, of all demands for any proportion or contribution of any costs, either in law or in equity, to be paid by him, the said George Bowden; and it was then and there offered on the behalf of the defendant and the witness, by their attorney, to pay to the plaintiffs the costs of the suit in equity, and that they would, at their own expense, procure the bill in equity to be dismissed as to them; but which offer the said plaintiffs did not accept, alleging that the said suit was still depending, and that there were other plaintiffs therein besides the defendant and George Bowden. Whereupon, the said Chief Justice did then and there refuse to admit the evidence of the said George Bowden so offered as aforesaid; and the counsel for the defendant then excepted to the opinion of the Chief Justice, insisting that the said George Bowden was a competent witness for the defendant touching the matters in question. The whole of this proceeding appeared on the bill of exceptions which was tendered and signed by Lord Loughborough, and it having been removed into this court by a writ of error,

Per Cur. This case involves in it the question which has been so repeatedly agitated in the courts of law:—What objections go to the credit, and what to the competency of the witness? than which no question is more perplexed. We believe it was first held in *Ridout v. Johnson*, that one underwriter cannot be a witness for another. We have taken great pains (though without success) to get the real statement of that case, because it may, perhaps, have been determined on its own particular circumstances. However, in consequence of

* But an owner of a ship is not a good witness (in an action on an insurance of goods put in that ship) to prove her seaworthy; see *Rotheroe v. Elton*, Peake, 84; S. P.; Fox v. Lushington, Id. 85.

that determination, judges at Nisi Prius have frequently rejected underwriters as witnesses; nor is it extraordinary that at Nisi Prius they should have been guided by the only case upon the subject, without much examination into the grounds of it. But it necessary now to decide the question in a more solemn manner. With regard to two of the questions which have been argued at the bar, they are not entitled to much consideration. The first of them is, that the witness was interested, because he was to contribute to the release; that is a clear and decisive answer. The other is, that he was liable to pay costs in the suit in equity; and the answer to that is that he did every thing which he could to discharge himself from that objection by offering to dismiss his bill at his own costs. The case of *Goodlike v. Welford* shows that if a person who is tendered as a witness does every thing in his power to get rid of any objection to his testimony, it shall not be competent to the other party by an obstinate refusal to prevent his being examined. Then the remaining and principal question is, whether this witness, having subscribed the policy as an underwriter, has thereby rendered himself altogether incompetent? because if he were incompetent to answer any questions he ought to have been rejected generally. Then we must see whether, on this record, the fact on which he was required to speak might be such as he was competent to answer. On the principle of necessity alone, we think this witness ought to have been received. If the questions intended to be put to him were as to any representation made to him by the underwriters at the time of subscribing, he must be admitted as a witness from necessity; for he was the only person who, from the nature of things, could speak to that transaction, and as such the underwriters had a right to call on him for his testimony; for it is scarcely possible that that which he alleged to the underwriters when they subscribed could be proved by any other person. Besides, it is admitted that, if he had been called as an agent, he might have been examined; now *non constat* but that was the case here: and as he was rejected generally, the judgment must be reversed. On the general ground, whether one underwriter can be examined for another who has subscribed the same policy, we incline to think there is no objection to his competency. When the case of *Walton v. Shelly* was argued here, we looked into all the cases on the subject, and particularly into those on this head. The Court in that case, approved of what was laid down by Lord Hardwicke in *R. v. Bray*, that it was better to lean against objections to the competency, and to let them go to the credit of the witness. The true line we take to be this: is the witness to gain or lose by the event of the cause? Now this witness could not gain or lose by the event of this cause, because the verdict could not be evidence either for or against him in any other suit. This has been likened to cases where witnesses have been rejected on the ground that they shall not be permitted to invalidate instruments which they themselves have signed; but the ground of that objection is, that it is holding out false credit to the world, and must be confined to negotiable instruments. If a person were permitted to set aside such an instrument, it would enable him to commit a fraud. But, for the reasons which we have stated, we think this witness ought to have been received; the consequence of which is, that the judgment must be reversed, and a *venire de novo* must issue, returnable in this court.

S. Bird v. Thomson. E. T. 1795. N. P. 1 Esp. 339.

This was an action to recover the loss on a policy of insurance on a ship and goods at and from the Bahama Islands to Liverpool. The policy was admitted, and the interest as averred in the declaration; the loss was by barratry. It was proved, on the part of the plaintiff, that the ship had taken on board a letter of marque; that she had chased and captured several ships during her voyage, out of her course; and that she afterwards went to Bermuda, where she was lost. To prove that this was done by the consent and with the knowledge of the owners, the captain of the vessel was called by the defendant. It was, for the plaintiff, asked if he had a release; and being answered in the negative, his competency was objected to. The counsel for the defendant contended that it was unnecessary, as the underwriters had no claim by consent

Nor is the captain of a ship an admissible witness to disprove barratry, by showing that the barratrous acts were done by consent

and direction of the owner, without a release from the underwriters;

against him. Lord Kenyon said that a release was certainly necessary, to render his testimony admissible. That if the plaintiff obtained a verdict, he conceived that the defendant might maintain an action against him, the loss having arisen from the barratry, which was his act; for though he knew of no action of that sort ever having been brought, yet he conceived that, wherever a man acted contrary to his duty, whereby another received a damage, or was rendered responsible, or liable to damages, he might maintain an action *ex delicto* against the person who so subjected him. That, in the present instance, the captain had a duty to perform, as well to the underwriters as to the owners and freighters, which duty he had violated, and thereby subjected the underwriters to the amount of the policy, if he had, as was asserted, been guilty of the barratry imputed to him. His lordship rejected his testimony, and the plaintiff recovered.

4. *DE SYMONDS v. DE CABOUR* M. T. 1806. C. P. 2 N. R. 374.

Or to disprove a deviation in an action on a policy on goods,

In an action on a policy of insurance on goods from London to Emden, where the ship was lost by putting into the Texel.

Sir J. Mansfield, C. J. The sole question at the trial was, whether Emden or the Texel was the original destination of the ship? There was no question about deviation. It is true that the witness was asked in cross-examination whether it would not have been more convenient to return to England? but the object of that was to show that the Texel must have been the original destination. The sole view with which the captain was examined was to show what was the original destination, and that was the only question left to the jury. If the question had turned on a deviation, the captain could not have been examined. But here he acted under the direction of the owners of the goods. If the destination of the ship had been put in issue by a special plea, there can be no doubt that he would have been a competent witness.—Considering, therefore, that this was the only real question raised I do not think that the interest of the captain could be affected by the decision of the cause.

5. *TAYLOR v. M'VICARS*. H. T. 1808. N. P. 6 Esp. 27.

So, depositions taken in an action on a policy of insurance against the captain, who is also part owner, where the loss is imputed to his misconduct are not evidence.

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This was an action on a policy of insurance on goods on a voyage from Liverpool to Waterford; the loss was stated to be by perils of the seas; the loss was proved; but the defence set up was, that the captain had deviated from the voyage by going into a port in Wales, where the loss had happened. The plaintiff, after calling two witnesses, from whose cross-examination the defence set up was disclosed, proposed to read the depositions of the captain, who was also part owner of the ship, and which depositions, he being abroad, had been regularly taken under an order made in a previous stage of the cause. The defendant objected to their being read, on the ground that the captain, both in his capacity of captain and part owner, was interested in having a verdict found for the plaintiff, inasmuch as, if the plaintiff failed in recovering the amount from the underwriter, the defendant on account of a deviation, might have an action against him as captain, for his misconduct in being guilty of such deviation, whereby the plaintiff had been prevented from recovering the amount of the policy from the underwriters; and in which action, not only the value of the goods, but also the costs incurred in the action against the underwriters might be recovered. Mansfield, C. J., decided, that the depositions could not be read, as the person, both in his capacity of part owner and captain was interested. He said, the verdict would not be evidence of the fact of the deviation or misconduct of the witness; but it would be evidence of certain expenses incurred by the plaintiff in an action on the policy, and the costs he was obliged to pay in consequence of his failure in such action, which failure had arisen from the misconduct of the witness himself.

6. *ROSS v. HUNTER*. M. T. 1790. K. B. 4 T. R. 33.

In an action for a loss by barratry in the master, on

Action on a policy on goods on board the Live Oak, whereof Joseph Rati was master, at and from Jamaica to New Orleans. It appeared that the ship was put up as a general ship at Jamaica in 1783; that she sailed on the voyage insured in May 1783, and arrived in June following at the mouth of the river Mississippi, which leads up to New-Orleans in Spanish America, at the

distance of about thirty-five leagues. When the captain had got thus far he dropped anchor, and went in his boat up the river to New Orleans, and on his return without carrying the ship to her port of destination, stood away for the Havanna, after which he was never heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reasonable evidence for supposing he intended to have disposed of at New Orleans; but finding it difficult to do so on account of a prohibition to import them into the Spanish government, he went to the Havannah. The jury found for the plaintiff on the count in the declaration, charging the barratry of the master.

Per Cur. Barratry is a question of law, which, like other questions of law, arises out of facts and has been well settled. In one sense of the word, it is under the direction of a deviation by the captain for fraudulent purposes of his own; and that is the distinction between deviation as it is generally used, and barratry. Then the question is, whether the captain in this case deviated with a fraudulent view, so as to constitute barratry upon the evidence given in the cause? that will depend upon two questions; 1st. What is necessary for a plaintiff to prove upon a declaration for the barratry of the captain? 2ndly. What evidence there was in this case of fraud in the captain? First. It appeared that the ship had been put up as a general ship, ready to take goods of any person to the port to which she professed to be destined; the owner of goods, therefore, may in such a case be supposed in general to be an entire stranger to the ship; he deals with the captain *qua* captain; he knows him in no other character; he acts under the information of the advertisement, which is usually put forth on those occasions, wherein *Rati* was in the present instance described to be master. By the terms too of the policy, the underwriter contracted to indemnify the plaintiff against the barratry of this very man. in case then of a loss, what is incumbent on the plaintiff to prove? He must prove the subscription of the underwriter, his own interest in the goods, his shipping them on board the vessel described in the policy, and the loss of them in consequence of such an act by the captain as amounts to barratry, that is, that he went out of the course of his voyage for a fraudulent purpose. It was not incumbent on the plaintiff to prove that the captain was not the owner, for that would be calling on him to prove a negative; and if the captain were not the owner, it is immaterial who was. Proof of that fact which operates in discharge of the other party, lies upon him. We agree that, if the captain had freighted the ship for the voyage, he could not be guilty of barratry; but the proof of such fact lies equally on the defendant. It is then asked, why it should not be presumed that the captain went out of his course by the direction of his owners, if he had any? The reason is plain, because the Court cannot presume fraud in any other person. The case put of an indictment for burglary does not answer the purpose for which it was cited. For suppose the goods were not actually taken and carried away, observe what would be sufficient to be proved; the fact of breaking and entering the house, and whose house it was, and that it was in the night; because all these circumstances are specifically alleged in the indictment, and they are all affirmatives; then the intent with which these facts were done is equally material; but if the prosecutor prove all the former circumstances, it is a question for the jury to determine whether he did not enter with a view of stealing the goods, unless the party accused can show to their satisfaction that his intent was innocent. That brings us to the next question, which, in our opinion is the most material one here, namely, what was the view of the master when he sunk his anchor at the mouth of the river Mississippi? For if it were done with a fraudulent view, we hold that the very sinking of his anchor was an act of barratry. His intent in so doing was a question for the jury; and they have found by their verdict that it was with the barratrous intent charged. It appears that he had some negroes on board belonging to himself, which he wished to have disposed of at New Orleans; but finding, upon going up thither in his boat, that he should not be able to do so, he returned back again to his ship, and immediately sailed for another port. Then is it too much to say, that he went to New Orleans for

the purpose of his own private advantage, and that the stopping of the course of his ship was for a fraudulent purpose? Does it not clearly prove, that when he dropped his anchor, he did not intend to go to New Orleans, unless it suited his own private advantage? The evidence too to be collected from the letters shows that he was considered as a thief and criminal, and pursued as such, and that all the persons concerned treated him in the character of master only.

7. *FORRESTER v. PIGOU*. H. T. 1813. K. B. 1 M. & S. 910. 3 Campb. 380.

When an underwriter, who had been paid the amount of a loss, on condition of being repaid, if the policy turned out to be invalid, was offered to prove that a material letter had been concealed in effecting the policy, his testimony was deemed inadmissible.

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The first and second underwriters, upon a policy of insurance, who have paid the loss, upon an undertaking made to them by the assured to repay the money in case they failed, in an action brought by them against a subsequent underwriter, called a witness of the name of Noble, who was the first underwriter upon the policy, and who stated upon the *voir dire*, "that he had paid the loss, upon an understanding that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiffs, promising to return the money in that event." Lord Ellenborough held that the witness was incompetent. The defendant then called another witness, named Gregory, the second underwriter on the policy, who upon the *voir dire* stated, that he had paid the loss; but that he had been since promised by one of the plaintiffs that he should be placed in the same situation with the other underwriters if they did not settle. Upon this statement the Lord Chief Justice inclined against the admissibility of this witness, and he was also rejected.—The jury found a verdict for the plaintiffs.

Lord Ellenborough, C. J. The undertaking to Noble appears to have been at the time, although there was a subsequent confirmation of it by letter; but as to Gregory, the time does not appear. If then either of the witnesses was in a condition to be admitted, there ought to be a new trial. Whenever the question comes distinctly before the Court, whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark, that that proposition is to be received with great qualification. It may depend upon the time and circumstances under which that communication was made; but on the mere naked unaccompanied fact of one name standing first upon the policy, I should not hold that a communication made to him was virtually made to all the subsequent underwriters. But the question is of such magnitude, that if it should arise, I should direct it to be put on the record, in order that it might be submitted to the consideration of all the judges. In this case, one of the assured being the person who effected the policy, the defendant *ex necessitate* is more thrown upon the testimony of the underwriters than in ordinary cases, where the policy is effected through the medium of a mere broker. It will be proper, therefore, that the case should undergo another consideration, in order to ascertain the time when the undertaking was made to Gregory in particular, and also to the other witness. In the case of *Barlow v. Vowell*, it certainly does appear, as has been suggested in the argument, that the witness was the original witness of the wager; it was a fraud, therefore to deprive the party of the benefit of his testimony. So in *Burt v. Baker* the broker was the common agent and witness of both parties, and therefore his testimony was not to be deemed inadmissible. But if a person, who is under no obligation to become a witness for either of the parties to a suit, choose to pay his debt beforehand, upon a condition that is to be determined by the event of that suit, he becomes as much interested in the event as if he were a party to a consideration rule. *Per Cur.* Rule absolute. See 3 T. R. 27; 2 East, 469.

(k) *Verdict.*

1. *BARBER v. FRENCH*. M. T. 1779. K. B. 1 Doug. 294.

Where there has been only an average loss, if the account is so complicated that

Action on a policy of insurance on the ship the *True Blue*. The counsel at the trial had begun to examine witnesses to prove the amount of an intricate average loss; but the judge thought it would be impossible to adjust a complicated account of that sort at *Nisi Prius*. He therefore proposed that a verdict should be found as for a total loss, the plaintiff entering into a rule to account upon oath to the defendant for what he might recover of the property insured. The

defendant upon this desisted from cross-examining further, as to the particulars, value, &c.; and a verdict being found as for a total loss, the rule proposed was entered into; but the defendant being afterwards dissatisfied, moved for and obtained a rule to show cause why there should not be a new trial, on the ground that the evidence did not go to a total but only to an average loss. The plaintiff was a bankrupt, and it was now said, as an argument for making the rule absolute, that his assignees were not bound, and that the rule could not be enforced by attachment against them. This difficulty, however, was obviated, by the counsel for the plaintiff stating that the assignees would enter into any undertaking, for the purpose of making the rule binding upon them.

Lord Mansfield said he had often known such rules made, where the account was so complicated that it could not be taken in court, and blamed the defendant's conduct in desisting at the trial from the examination as to the particulars of the damage after the proposal by the judges, and then coming for total loss. He said if the plaintiff or his assignees should not comply with the rule by which they undertook to account, the defendant might apply to the court to stay execution. Rule discharged.

2. *FERZE v. THOMPSON*. H. T. 1808. C. P. 1 Taunt. 121.

In order to show that the voyage, which had its inception from an enemy's country, was not illegal, the plaintiff produced the King's license, which permitted "J. Baker, and Sons, on board six neutral ships, the names of which they were unable to set forth, to import without molestation, from any port of Holland, such goods of the sort therein enumerated, being the property of the said Thomas Baker and Sons, as might be specified in their bills of lading; provided that any who should claim the benefit of the license thereby granted should take and use the same, on condition that if any question should arise in any of his Majesty's courts of admiralty, or elsewhere, whether such person had in all points conformed thereto, in all cases whatsoever the proof should be on the person using that license, claiming the benefit thereof." And in the margin was written, "Thomas Baker and Sons, License to import." Baker, who was the ship's broker, proved that licenses for all persons on whose behalf he acted were constantly taken out in his own name, agreeably to this form, which was now universally used; that he appropriated the license produced to the ship which brought home this cargo, as one of the six which were to be protected by it, and that the plaintiff repaid his portion of the fees paid for obtaining it at the Secretary of State's office. The counsel for the defendant, objected that this license did not specify the name of any persons trading under it, except of Baker and Sons, and therefore did not legalize the adventure of the plaintiff; and the Chief Justice reserved this point. The jury being about to pronounce a verdict for the defendant, because they could not ascertain any given sum to be the proportion due to the plaintiff, a nonsuit was taken.

3. *KINGSTON v. MACKINTOSH*. M. T. 1808. N. P. 1 Campb. 517, 518. 2 Campb. 427. S. P. *HIGGINS v. SARGENT*. M. T. 1823. K. B. 2 B. & C. 348.

This was an action upon a policy of insurance, and the only question was, whether the plaintiff could be allowed interest.

Lord Ellenborough. No interest can be given in such a case here, although in other places, proceeding upon grounds which I do not presume to controvert, they do give interest. But I cannot advise a jury to allow interest upon a policy of insurance, more than upon book debts, and in all other cases where a sum of money is found to be due from the defendant to the plaintiff. I dare not usurp a power which the legislature has not conferred upon me, and which has not been exercised by my predecessors. I must act upon the law as it stands; whether it be right or wrong, I cannot take upon me to change it. Had the money been payable at a certain day, the plaintiff would have been entitled to interest; but upon such a debt as this, I am of opinion that he is not. I have considered the subject maturely; and if I am mistaken, I shall be glad to be set right.

(1) *Special case.*

ROUTH v. THOMPSON. T. T. 1809. K. B. 11 East, 428.

A state
ment in a
case reserv
ed, that the
insurance
was on ac
count of
the captors,
was held
to preclude
the consid
eration,
whether a
count aver
ring the in
terest to be
in the
crown, and
the insur
ance made
on account
of his Ma
jesty, could
be sustain
ed.

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This was an action upon a policy of insurance upon a ship and freight from Lisbon to London. The ship was a Dane, had been seized as such after his Majesty's proclamation of 2d September, 1807, by his Majesty's armed ship the Duchess of Bedford, had received some repairs at Lisbon, and had taken in a cargo there to London. In one count the interest is averred to be in his Majesty, and the insurance is stated to have been on his account; and in another, the interest is averred to be in the commander, officers, and crew, of the Duchess of Bedford, and the insurance is stated to have been on their account. The case expressly states that the policy was effected on account of the captors. *Per Cur.* That statement precludes us from considering it as effected on account of the crown. Had there been no such specific statement, it might have been open to us to consider whether the policy were not referable to the interest of the crown; but after a distinct statement that it was effected (not on behalf of the crown, but) on account of the captors, it must be referred wholly to them, and the plaintiffs must recover or fail according as they have or have not a right to aver an interest in themselves. This brings us to the question, whether they had an insurable interest? Their right in this respect has been put upon two grounds: 1st. That they had a well-grounded expectation, warranted by the practice of the crown in similar cases, that the ship and freight, had their been no loss, would have been granted to them. 2ndly. That they had the lawful possession, and were liable either to the crown or the foreign owner, for the safe custody of the vessel; and that on either of these grounds they were warranted in insuring on their own account. As to the first, it is material to see in what situation the captors stood: it is clear they had no vested right: they could demand nothing of the crown: had the crown made the grant in their favor, it would have been altogether *ex gratia*, a mere boon and gift. That gift might have been of the whole, or it might have been of part, and of a very inconsiderable part only. The bounty of the crown would probably have been proportioned to the merit of the detention and capture, and the value of the prize. Had any considerable danger attended the performance of these services the grant would have probably extended to the whole; had their been no danger or difficulty in them, the grant would probably have been smaller; and had it appeared that the seizure had been made upon speculation only, without any knowledge of the proclamation, there probably would have been no grant at all. At any rate, however, if there were a grant, it would be mere bounty; and has a man a right to indemnity because he has lost the chance of receiving a gift? Had the ship arrived in safety, the captors would have had a chance of a grant from the crown; but can they, in respect of that chance, insure the ship's arrival? To what extent could they insure? Not to the whole value, because the grant might only have been of part; nor to any given part, because it must have been uncertain what part, if any, would have been granted. The utmost extent is the value of the chance; and how is that to be estimated? If application be made to the crown, to know what it would have granted if the ship had arrived? And what is to be the case if the answer be, as it probably would be, that the crown never has considered, nor has occasion to consider, that point? Independently, however, of the difficulty of fixing the value, and supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest be so described in the policy? Can a man who has no right, legal or equitable, in ship or freight, effect an insurance on either, merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety? The declaration must aver an interest in the subject insured, and that interest must be proved; and how can it be said that these captors have any interest either in this ship or freight, when the ship is altogether the King's, the freight is altogether the King's, and the captors have no interest in either, nor other concern in respect to the same, beyond the mere chance that the King may be induced to give them

something out of the produce of such ship and freight? In *Lucas v. Hughes*, which was cited in the argument, part of the captors at least, viz. the seamen, were considered as having a vested right in the ship and cargo as prize to a certain extent; and the Court decided that the capture was within the prize act, and the captors had, therefore, a right vested by that act. As to the second ground, that the captors had the lawful possession, and were responsible, either to the crown or to the Danish owners, for the safe custody of the vessel; is this a true representation of their situation? They certainly had the lawful possession; but were they responsible for the ship's safety, unless as far as that safety might be endangered by any wrongful acts of their own? The seizure was warranted by the King's proclamation: that made their possession lawful. The subsequent declaration of hostilities put an end to any claim by the Danish owners, and of course to all responsibility of the captors in respect to them. It then became their duty to act for the best, with a view to the safety of the ship, and the mere interest of the crown therein. They were bound to leave Lisbon; it was for the interest of the crown that they should make the ship instrumental in withdrawing from Lisbon as much property as she could properly carry; they acted, therefore, for the best, and were consequently justified in respect to the crown in what they did. The crown cannot call upon them for damages; and they have no right to ask for a sum as an indemnity, when they have not been, and (under the circumstances stated) could not have been, damaged. The consequence is that the plaintiffs have no right to recover on the policy.

Interest. See *tit. Bankrupt; Error, Writ of; Stock.*

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p. 594.

III. ————— IN PARTICULAR.

LAR.

(A) **ON SIMPLE CONTRACTS.**

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(b) *In particular.*

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(a) Awards, p. 609. (b) Bonds, p. 611. (c) Mortgage deed, p. 612. (d) Replevin, bond, p. 614.

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IV. REMEDIES FOR THE RECOVERY OF, p. 617.

1. RATE OF INTEREST.*

* By 12 Anne, c. 16. no person shall, directly or indirectly, for loan of any money, or any thing, take above the value of 5*l.* for the forbearance of 100*l.* for a year, and so proportionally for a greater or less sum; and all bonds, contracts, and assurances, made for payment of any principal sum to be lent on usury, above the rate of 5*l.* per cent. shall be void. And whoever shall take, by way of corrupt bargain, loan, &c., a greater interest, shall forfeit treble the money borrowed; one half of the penalty to the King, and the other to the prosecutor. Scriveners or brokers taking more than 5*s.* per cent. procuration money, or more than 12*d.* for making a bond, forfeit 20*l.* and suffer imprisonment half a year. The cases connected with an infringement of this statute will be collected and arranged under *tit. Usury, post.* The rate of interest for loans advanced within the dominions of native and independent Indian sovereigns, by British subjects, domiciliated and residing within such dominions, is not limited to twelve per cent.; see 3 *Bing.* 193.

1. *BODELY v. BELLAMY*. H. T. 1778. K. B. 2 Burr. 2074; S. C. 1 W. Blac. 267.

India interest for money, when made principal here, carries English interest.

Action of debt on a bond of 1000*l.* conditioned to pay 500*l.* with India interest, and also on a count for a mutuatus for 500*l.* In Michaelmas term, 1756. the cause was tried in London, and a general verdict for the plaintiff. But by means of the defendant's delays by injunction bills, &c., the final judgment was not entered till this term, which was for the whole 1500*l.*, the interest due having now exceeded the penalty of the bond. It was moved to stay execution, upon payment of the whole penalty and costs, because no evidence had been given on the mutuatus. But counsel for the plaintiff contended, that having got an advantage at law, which the defendant might have excepted to in time, he shall not now be stripped of that advantage by the interposition of the Court; but that execution shall be taken out for the whole sum *bona fide* due.

Lord Mansfield, C. J. When a judgement is once obtained on a contract carrying interest, the subsequent interest must follow the rule of this country, in like manner as on old mortgages bearing six per cent. interest. Though Lord Talbot determined that the interest, when accumulated and made principal, should follow the nature of the original debt, yet Lord Hardwicke afterwards settled it, that it should only bear modern interest at five per cent. I find different rules established in our different courts, with respect to this matter of interest on sums thus accumulated and liquidated. The question principally occurs in our courts of appeal and error; in parliament they always consider interest in the quantum of costs, which is always some specific arbitrary sum. In writs of error to the Exchequer Chamber, from the Court of Exchequer, they always compute interest to the day of affirming the decree. In writs of error from hence to the Exchequer Chamber, or in this court from the Common pleas, the practice has been not to compute interest, unless in some special cases, such as Stra. 925: I think the practice unreasonable; therefore, in this case, let Indian interest run to the day of the judgment; and from thenceforth only five per cent. on the accumulated sum of principal, interests, and costs, to the day of execution; and let execution be taken out to the amount of the whole. The nature of the contract furnished this remedy; since an action might be brought upon the judgment, without having recourse to the mutuatus; for I should not care to have the justice of this court depend upon a blunder in entering the verdict.

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2. *DEWAT v. SPAN*. M. T. 1789. K. B. 3 T. R. 425.

The statutes authorizing the taking of a higher rate of interest for monies advanced on land in Ireland or the colonies does not extend to money advanced on mere personal securities.*

Debt on bond for 2800*l.*, made in England. The defendant craved oyer of the condition, which (after reciting an agreement made in June, 1769, between C. Philips and the plaintiff's father, for the purchase of an estate at St. Christopher's by the former of the latter, for 1800*l.*; and that it was agreed at the making of that contract, and it was a part of the terms thereof, that 1400*l.*, a part of it, should remain by a joint bond of C. Philips, and another person to be in that behalf appointed, and who was resident in England; in consequence of which he, together with H. Holt, became bound to the plaintiff's father for the 1400*l.*, with interest at 6*l.* per cent., and also reciting that it had been since proposed and agreed between C. Philips and the plaintiff, that the former bond should be cancelled, and a new bond given for the 1400*l.*, with interest at 6*l.* per cent., agreeable to the interest of the original contract) was that, on

* When the payment of a debt wrongfully withholden, the rate of interest is to be calculated according to the laws of the country where the debt was contracted, and is not governed by the amount of the interest allowed in the country where the debt is sued for; but in a court of equity the debtor is allowed the rate of exchange of the country where the debt was contracted; see 1 Eq. Abr. 289; 2 Bridgm. Ind. 88. On a late trial, in an action on a bill of exchange, drawn in Bermuda, on a person in England, and also payable in England, the plaintiff recovered seven and a half per cent. interest, being the rate of interest at Bermuda; see Chitty on Bills 5 Edit. 540; 6 T. R. 171, 172. A doubt was entertained whether the statute of 12 Anne, st. 2. c. 16. which reduced the rate of interest to five per cent., did not extend to money lent on lands in Ireland or the plantations, when the mortgage was executed in Great Britain; but the statute 14 Geo. 3. c. 79, declares all such securities made previously to that act to be valid notwithstanding the 12 An-

payment of 1400*l.* by Philips, or the defendant, with interest at 6*l.* per cent., [594] &c., the bond should be void; and then pleaded, 1st. *Non est factum*; 2ndly. That after the 29th of September, 1714, and after the death of the plaintiff's father, and before the making of this bond, it was corruptly and against the form of the statute agreed between the plaintiff and Philips, that the bond so entered into by Philips and Holt should be cancelled, and that the plaintiff should forbear, and give further time of payment of the sum of 1400*l.*, until the 25th of June, 1789, and should for such his forbearance, be paid interest on the 1400*l.* in the mean time, after the rate of 6*l.* for every 100*l.* by the year; and that for securing the payment as well of the 1400*l.* as the interest, this bond was given, and an averment that the former bond was given up to be cancelled, by means, &c., the present bond was void.

Lord Kenyon, C. J. The question is, whether a bond given by one person to another, both resident in this country, is valid, though it reserve a greater interest than is allowed by the laws of this country. The statute 14 Geo. 3. c. 79. (which it has been argued protects this case) is an enabling act, extending to particular cases there mentioned, and does not reach any others. Now it enacts that mortgages and other securities, respecting bonds in Ireland and the West Indies, reserving interest allowed in those countries, shall be valid, though executed in England; but it does not extend to personal contracts; and if the present attempt were to succeed, it would sap the foundation of the statutes of usury. The three other judges concurring, rule discharged.

II. WHEN AND WHEN NOT RECOVERABLE IN GENERAL.*

(A) ON SIMPLE CONTRACTS.†

(a) *In general.*

DE HAVILLAND V. BOWERBANK. M. T. 1807. N. P. 1 Campb. 50.

In an action for money had and received; the facts as admitted were shortly these:—Under a commission of bankruptcy against a creditor of Bezail, his executors in the year 1784 proved a debt of 904*l.* 4*s.* 1*d.* Upon this sum the defendant, as their agent, received five dividends: of these he had paid over written con two; but the other three, which he had received in the years 1797, 1798, and tract for 1799, he still retained in his hands, making together the principal sum of 339*l.* [595] 1*s.* 4*d.* The only question between the parties was, whether the defendant the pay ment of money on a day cer tain. should pay interest from the respective times of receiving the money, or from a demand of payment which had been made about two years ago? There was no proof of any express promise to pay interest, or that any use had been

ne, where the interest is more than the established rate of the particular place, and that all future securities of the like kind shall also be valid, where the interest is not more than six per cent.; see 6 T. R. 171, 172; and the money lent is not known at the time to exceed the value of the property pledged. However, it has been held, that the statute 14 Geo. 3. is an enabling act extending only to particular cases; and it does not extend to such bonds as are mere personal contracts, but only protects mortgages and other securities respecting lands in Ireland or the plantations; see 3 T. R. 425. Where a debt was contracted in England, but the bond was taken for it in Ireland, to be paid at a certain time, and at seven per cent., it was held by the Court of Chancery, that it should carry Irish interest; see 2 Atk. 382; Erec. Chanc. 128; 1 Peers Wms. 395; 2 Atk. 465; but a different doctrine was held when the bond, contracts, or mortgage, was executed in England, in which case only five per cent. is allowed, independently of the statute 14 Geo. 3; see 1 Peers. Wms. 696; 3 Atk. 727; 1 Ves. 1027; 11 Ves. jun. 314. So it seems that only five per cent. interest can now be received on securities executed in England, and not made on property in Ireland or the plantations. In case a bond or other debt, contracted in Jamaica, be made payable in London, it has been held that the expense of commission to the agent remitting the money falls on the debtor.

* The general rule is, that in the absence of an express stipulation, or a written security, 15 East, 223; 1 Rose, 399; to pay the principal on a fixed day, the law does not imply a contract on the part of the debtor to pay interest on the sums he owes, although the payment of the principal as, a debt may have been frequently demanded; see 1 Campb. 50; 2 Id. 426. The cases in the text will fully confirm and illustrate this rule.

† Where, after a creditor has endeavoured to obtain payment, there has been a wrongful withholding of a debt arising out of a contract which does not carry interest, the jury may allow interest in the shape of damages for the unjust detention of the money; see Arnet v. Redfern, 3 Bing. 353; S. C. 2 O. & P. 88.

made of the principal by the defendant; nor did it appear that interest had been at any time paid on this or any former balance between the parties.

Lord Ellenborough. I want very much to lay down a certain rule respecting the payment of interest. I recollect some extremely capricious determinations on this subject; and on all occasions, as little as possible should be left in the discretion of a judge. It appears to me, that interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day as on bills of exchange, promissory notes, &c.; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be enforced that this was their intention; or where it can be proved that the money has been used, and interest has been actually made. Without some restriction of this kind, book debts might be allowed to bear interest; and in every action for work and labour, or for goods sold, there must be a calculation of what is due for interest above the principal debt. Mr Justice Buller, in one instance, allowed interest on policies of insurance; but I believe, that he was then thought to have done wrong. My great object is to have a fixed rule, and to exclude discretion.

(b) *In particular.*

1st. *On an account stated.*

1. BLANEY v. HENDRICK. E. T. 1792. K. B. 2 W. Bl. 761; S. C. 3 Wils. 205.

Semb. interest is recoverable on an account stated for money lent.

It was moved to set aside a writ of inquiry, because the jury had allowed a sum of 81l. 6s. 8d. as interest up to the time of the inquisition, on a balance of 2,507l. due on an account stated between the bankrupt and the defendants. The case of *Perrick and Willet, Barnes, 151.* was cited, that no interest could be allowed on a writ of inquiry, for money due for goods sold and delivered. It was, for the plaintiff, alleged, that it is a settled rule, that every liquidated sum due from one man to another carries interest, both in law and equity, as much as a note of hand, payable at a certain time. It was settled in *Barnet and Parker*, that a balance upon a stated account will carry interest between merchants; and by Lord Hardwick, Chancellor, in *Robinson v. Bland in the King's Bench (Burr. 1077.)* that money lent carries interest to the judgment, and this balance appears, from the defendant's own affidavit, to be for money lent and advanced.

But merely striking of a balance of an account for

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goods sold, does not entitle the party in whose favour the balance is found, to interest from that time unless the money then was to be paid.

Gould, Blackstone, and Nares, Justices (absente Chief Justice de Grey.) Though the interest was properly allowed, interest is due on all liquidated sums, from the instant the principal becomes due and payable. Therefore, on all bills of exchange, notes of hand payable at a day certain (or after demand, if payable on demand,) and on money lent; *Burr. 119. Vernon v. Cholmondeley.* Goods sold and delivered are usually upon credit of three months, six months, or indefinite. Nor is the sum liquidated till the jury find the value.—Rule discharged.

2. CHALIC v. YORK, DUKE OF. M. T. N. P. 6 Esp. 45.

Action was brought to recover the price of wine sold by plaintiff to the defendant. The plaintiff's counsel offered to give in evidence, that in the year 1800, an account had been settled between the parties, and a balance struck in favour of the plaintiff. On that settlement of balance, his counsel contended, that he was entitled to interest on the account so settled, from the year 1800; and it was said to have been so decided, in a case from *Wilson's Reports.* Lord Ellenborough ruled, that where the action was for goods sold and delivered, the mere settling the balance did not entitle the party to interest from that time; nor was he so entitled, unless a time was fixed for the payment of the money, from which time only interest could be claimed. Verdict for the plaintiff, but without interest.

2d *Agent.*

BRUCE v. HUNTER. M. T. 1813. N. P. 3 Campb. 467; S. C. 1 Marsh. 224.

Agents, in account with their principal,

This was an action of *assumpsit* to recover the balance of an account. The plaintiffs had effected insurances, and advanced the premiums for the defend-

ant, and had transacted other business as agents for him, from the year 1801, may charge down to the present time. They had delivered an account to him annually; and interest, and make annual accounts, without a ny express contract to that effect. and at the close of each year, from the expiration of the first, had charged interest; and at each rest the interest of the preceding year was added to the principal. It was proved that at the several times when the annual accounts were rendered to the defendant, he had never objected to the charge of interest until the year 1811, when, he said that he was not bound to pay any interest. It was urged on his behalf, that interest could not be recovered against him, and much less according to the calculation of the plaintiffs, which amounted to compound interest, a claim never allowed at law or in equity; but,

Lord Ellenborough said, that it was fair and reasonable the defendant should pay interest in the manner charged, and that the accounts, to which he had not objected for a number of years, afforded sufficient evidence of a promise on his part to pay interest in this manner.

3d. Attorney's Bill.*

4th. Banker's.

1. EATON v. BELL. M. T. 1821. K. B. 5 B. & A. 34.

An inclosure act empowered the commissioners to make a rate, to defray the expenses of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners. Expenses were incurred in the execution of the act, before any rate was made. To defray these expenses, the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned, on account of the public drainage, and to place the same to their account, as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts. The latter having from time to time made half-yearly rests in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the account;

Per Cur. As to the question of compound interest, it is now settled, that a party advancing money to another is entitled to charge interest, and at the end of every year then to add the principal to the interest. In *ex parte Bevan*, it was expressly held, that although an antecedent contract for a loan for twelve months, to settle the balance at the end of six months, and that the interest should carry interest for subsequent six months, would be bad; yet that an agreement at the end of six months to settle accounts (that not being part of the prior contract) and then a stipulation to forbear the balance then struck for those six months, is legal. It is clear from the facts stated, that the defendants assented to that mode of keeping the accounts, and the bankers who advanced the money might have done it on the faith that they should have been permitted to convert the interest from time to time into capital; and that they would not otherwise have continued to make the advances. We think, that upon the authority of the case cited, the plaintiffs are entitled to recover the interest charged; and, consequently, that the verdict must be entered for the larger sum. See 2 Anst. 495.

2. MOORE v. VUGHTON. M. T. 1816. N. P. 1 Stark. 487.

This was an action of *assumpsit* by the plaintiffs, as the assignees of Sheath, Steel, and Wray, bankrupts, against the defendant, for money lent, and for interest. It was contended, that with respect to such sums as should be provided to have been advanced to the defendant on his own private account, the plaintiffs were entitled to recover interest, calculated upon half-yearly rests, according to the universal practice of the house; but

Lord Ellenborough held that this claim could not be supported, unless it could be proved that the defendant knew that it was the practice to charge interest from such rests. See 2 Campb. 486.

5th. Bills of exchange and promissory notes. See title Bills and Notes.†

* Interest is not recoverable in an attorney's bill; see 2 B. & B. 229.

† The following points have been determined since the title Bills and Notes was printed: That interest is not recoverable on a bill of exchange unless it be produced; see 1 R.

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6th. Composition for tithes.*

7th. Deposit.

MAERLY V. ROBINS. T. T. 1814. C. P. 5. Taunt. 625; S. C. 1 Marsh. 258.

It seems doubtful whether interest necessarily accrues on a deposit which is so covered back.†

This was an action brought to recover the deposit-money for the purchase of a house in Curzon-street, which had been put up to auction by the defendant, and had been bought by the plaintiff. One of the conditions of sale was, that the purchaser should immediately deposit forty-five per cent. in part of the purchase-money, and should at the same time sign an agreement for the remainder, upon having a good title made out at the vendor's expense. The plaintiff accordingly paid down the sum 1800*l.*, being a deposit of 45*l.* per cent., and signed an agreement for the remainder, as above. At the trial of the cause before Lord Chief Justice Gibbs, at the sittings in this term, it appeared that the vendor's title to the premises was good in law, but not in equity. The jury accordingly found a verdict for the plaintiff, for the amount of the money which he had deposited, with interest for the same from the time of the deposit; the defendant having liberty to move to enter a nonsuit, if the Court should be of opinion that the action was not maintainable; or to reduce the damages, if they should decide that interest was not recoverable upon the deposit. Gibbs, C. J. The question is, whether the contract was merely a good legal title, or for a legal and equitable title. Now the words of the condition are, "that a good title shall be made out at the vendor's expense."—What can the meaning of that be, except that there shall be a good title, both at law and in equity? The vendor, therefore not having made out a good equitable title, the contract, on the part of the defendant's broker is rescinded. It is true, that we are in a court of law, but we are on the question, whether the contract has been complied with, according to the defendant's doctrine?—If an estate be devised to A., B., and C., it might be sold by A. and B. only, since they could give a legal title to it, without the concurrence of C. And if this principle were followed up, the defendant might bring an action for the remainder of the purchase-money.

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8th. Goods sold.

1. GORDON V. SWAN. E. T. 1810. K. B. 12 East, 419; S. C. 2 Campb. 429.

CALTON V. MAY. H. T. 1812. K. B. 15 East, 225. *semb.* overruling

MOUNTFORD V. WILLIS. M. T. 1797. C. P. 2 B. & P. 337.

Interest is not payable on the price of goods sold, although a day is fixed for the payment of the amount.

The plaintiff declared in the common form of the count for goods sold and delivered, and sought to recover a large sum, the value of copper sold by him to the defendant, under a contract in writing, which was given in evidence at the trial. After judgement by default, and a writ of inquiry issued, it was moved to set aside the inquisition upon the misdirection of the under-sheriff; and & M. 145. That interest upon a bill or note is only to be considered as damages for the detention of the principal money; therefore, where a promissory note was made abroad, and the payer did not sue upon it until thirty years afterwards, and the jury refused to give interest; the Court refused, on motion, to increase the amount of the verdict by adding such interest; see 1 D. & R. 16. Where an agent has money in his hands belonging to his principal, and purchased bills of exchange, which he indorsed specially to the latter, who at the time of the indorsement was dead, but the agent did not know it; held, that the administrators of the principal were only entitled to recover interest on bills accepted after the death of the intestate, from the time of the demand of payment made by the administrators, and not from the time the bill became due; see 5 B. & A. 204. Where a bill is payable at a specified period after date with lawful interest for the same; see 1 R. & M. 381; or, bearing interest; see 1 Stark. 452; Id. 507; interest is to be calculated from the date. In trover for a bill of exchange, the jury may include the amount of interest in the damages, although there is no mention of that in the declaration; see 2 B. & P. 550.

* Where there is an agreement for a composition for tithes, to be paid on a particular day, the sum to be paid bears interest from that day; but where there is only a general agreement for an annual payment, without specifying any time for the payment, no interest is payable; see Shipley v. Hammond, 5 Esp. 114.

† At all events it is clear that it is not recoverable when no demand has been made on him for the repayment of the deposit; see Lee v. Munn, 1 Moore, 481; S. C. 8 Taunt. 45. Though it may be obtained under a special count against the vendor of an estate, if he is unable to produce a valid title by the day appointed; see Farquhar v. Farley, 1 Moore, 322.

contended that interest began to run after the expiration of six months for which the credit was given; and that the giving of a party a particular day of payment for goods sold and delivered, showed the intention of the parties to consider it as a liquidated debt at that period, and made it competent at least for the jury to allow interest; and he referred to *Mountford v. Willis*, 2 B. & P. 337, where the vendor was held entitled to interest, under such a contract, from the day of payment given.

Lord Ellenborough, C. J. I think the contract only meant that the vendee, at all events, shall not be called upon for payment till the time given; but it is still a contract for the sale of goods. The giving of interest should, I think, be confined to bills of exchange and such like instruments, and to agreements reserving interest. See vide *Harrison v. Allen*, 2 Bing. 4.

2. *MARSHALL v. POOLE*. M. T. 1810. K. B. 13 East, 98. S. P. *PORTER v. PALS GROVE*. E. T. 1817. S. P. 3 Campb. 472. S. P. *SLACK v. LOWELL*, M. T. 1805. C. P. 3 Taunt. 157.

The plaintiffs declared on the common count for goods sold and delivered, and the proof was of an agreement dated "4th of August, 1809. Bought of J. & B. Marshall, 130 bales of cotton, on board the *Hercules*, at 15d. per lb., to be delivered at Liverpool on arrival. Payment in bills at two months, in ten days after delivery." No bills were given, but the action was not brought till after the bills would have become due. The officer thought that a debt of that kind, for goods sold and delivered, would not carry interest; but particularly, as the plaintiff's had not declared specially upon the agreement to pay in bills, but only on the common count for goods sold and delivered; and the jury found accordingly. But it was now urged, that inasmuch as the bills, if given, would have carried interest, the plaintiffs ought not to be in a worse condition by the defendant's breach of their agreement; and that as the principal money was recoverable on the count for goods sold and delivered, that would also cover the amount of interest, which was merely accessorial to the principal demand; and the case of *Bleeker v. Jones* was referred to, where the Exchequer Chamber allowed interest in a similar case upon a final judgment, from the service of the allowance of the writ of error until the affirmance of the judgment, though in that case there was a special count on the agreement. [600]

Lord Ellenborough, C. J. Interest may be considered in this case as parcel of the price of goods sold and delivered: if they had been paid for at the time of delivery, the price would have been so much less; but being to be paid for by bills payable at a future day, the value was to be so much more, in proportion to the interest that would have accrued upon the bill if that had been given according to agreement; therefore it seems to me that the amount of such interest may well be recovered on the general count for goods sold and delivered, as part of the estimated value of the goods to be paid for in that manner.

3. *BOYCE v. WARBURTON*. T. T. 1810. N. P. 2 Campb. 480.

This was an action for not accepting a quantity of deals purchased by the defendant for the plaintiff, to be paid by bill at four months. The breach of a contract on the part of the defendant was clearly proved, and the only question was, whether the defendant should be allowed interest on the amount of the stipulated price from the time the bill, if given, would have become due. Lord Ellenborough was of opinion that interest should be allowed, and directed it to be added to the damages. Rule was moved to set aside the verdict; but the Court said, that in either way the vendor was deprived of the use of money to which he was entitled on a certain day; and that interest would have been allowed had the bill been given but not paid; it would be unjust and absurd to withhold interest where the purchaser had from the beginning broken every part of his contract. And under a special one, whether the defendant has or has not accepted the goods.

9th. Insurance.

1. *KINGSON v. M'INTOSH*. M. T. 1808. N. P. 1 Campb. 518.

This was an action on a policy of insurance, and the only question was, whether the plaintiff could be allowed interest.

Interest can not be recovered in an action on a policy

for the recovery of the sum insured,

Lord Ellenborough. No interest can be given in such a case here; although in other places, proceeding upon grounds which I do not presume to controvert, they do give interest. But I cannot advise a jury to allow interest upon a policy of insurance, more than upon book debts, and in all other cases where a sum of money is found to be due from the defendant to the plaintiff. I dare not usurp a power which the legislature has not conferred upon me, and which has not been exercised by my predecessors; I must act upon the law as it stands; whether it be right or wrong, I cannot take upon me to change it. Had the money been payable at a certain day, the plaintiff would have been entitled to interest; but upon such a debt as this I am of opinion that he is not. I have considered the subject maturely; if I am mistaken, I shall be glad to be set right.

[601] 2. HIGGINS v. SARGENT. M. T. 1823. K. B. 3 D. & R. 613; S. C. 2 R. & C. 348.

Even altho' the money is not paid till long after the time stipulated:

Action of covenant on a policy of insurance, dated 10th of March 1819, whereby the defendants covenanted to pay to the plaintiffs the sum of 4,000*l.* at the expiration of six months after due proof of the death of a person named Burton; the case turned upon the question, whether at the time the policy was effected, Burton's was an insurable life. The jury, by direction, having found their verdict for the plaintiff, his counsel submitted for the first time, that the plaintiff was entitled to interest upon the principal sum insured, calculating the amount from the time the money was payable until the time of signing judgment. The learned judge was of opinion that interest was not recoverable upon this instrument, but saved the question for the opinion of the Court, whether he ought to have directed the jury to find interest? On the case coming before the Court, it was in support of the rule contended, that the interest ought to have been found by the jury as damages, and observed that the learned judge said at the trial, that if in point of law the plaintiff was entitled to interest, an application might be made to the Court to increase the damages. Bailly J., said: If I ought to have directed the jury to give interest, then the plaintiff was at liberty to move the Court upon this question. Now it is clear, that interest was recoverable in this action. This is specialty debt, the money being absolutely payable at a time certain, and, therefore, it would carry interest in point of law. It is upon this principle that interest is payable upon bills of exchange and promissory notes, though they be not specialties, and *a fortiori* interest sums upon a clear specialty debt. Interest is not due for rent in arrear; but the principle upon which it is not allowed is, because the landlord may recover his rent by distress and sale of the tenant's effects.

Per Cur. We are of opinion that the judge would not have been warranted in directing the jury to give interest on the principal sum in this case. The modern doctrine is quite decisive of this question; but according to the old authorities themselves, it would have been very difficult, in our opinion, to support the verdict of the jury for interest, even if the question had been left to their consideration, and they had given interest upon the money. It is, however, sufficient in order to dispose of this motion, to say that according to modern decisions the judge was not bound to direct the jury to give interest. Looking into these authorities it will be found to have been clearly established, that unless interest is payable by the usage of trade, or by the contract of the parties, either express or implied, or other circumstances, it is not payable by the common law; and, therefore, the jury would not be warranted in giving it, except in the case we allude to. It has been thought extremely desirable to lay down some general rule, which should remove all uncertainty in the exercise of the discretion both of judges and jurors on such question. In the *Nisi Prius* case of *De Havilland v. Rowerbank*, see 1 Campb. N. P. 40. Lord Ellenborough said, "I want very much to lay down a certain rule respecting the payment of interest. I recollect some extremely capricious determinations on this subject; and on all occasions as little as possible should be left in the discretion of a judge. It appears to me that interest ought to be allowed in cases where there is a contract for the payment of money on a cer-

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tain day, as in bills of exchange, promissory notes, &c.; or where there has been an express promise to pay interest; or where it can be proved that the money has been used, and interest has been actually made. Without some restrictions of this kind, book debts might be allowed to bear interest; and in every action for work and labour, or for goods sold, there must be a calculation of what is due for interest above the principal debt. Mr. Justice Buller, in one instance, allowed interest on policies of insurance; but I believe he was there thought to have done wrong. My great object is to have a fixed rule, and to exclude discretion." It was expressly decided in *Gordon v. Swan*, 12 East, 419. that although the money is to be paid at a certain day, yet the non-payment of it on that day does not give a right to interest from that period; inasmuch as there must be some contract, either express or implied, or some usage of trade, to give it. But we are of opinion that according to the principles of the common law, interest is not payable upon a sum certain, payable at a given day. By the common law, the action of debt was the only mode of recovering a sum certain, except where there was a breach of covenant. When the party sued in an action of debt, it was in the form of a writ out of Chancery, by which the defendant was summoned, and commanded that he render to the plaintiff the debt, or show cause why he had not done so. If the defendant paid the debt, the plaintiff could not go on with his suit, because payment of the debt would be an answer to the action. Suppose this had been an action of debt, the payment of the principal money would have been a valid defence, and would prevent the recovery of interest, because the interest itself is no part of the debt, but is merely claimed as damages for the detention of the debt. In cases, however, where the interest is due on a contract, express or implied, it may be laid for a part of the debt, and payment of the principal sum would be no answer to the action. But in this case there is no contract, either express or implied, to pay interest, and consequently it could form no part of the debt; and if recoverable at all, must have been in the shape of damages for the detention of the principal money. All the cases referred to have gone upon this principle; and therefore the judge could not have been warranted in directing the jury to give interest in this case. If the plaintiff had pursued his remedy in an action of debt, he could not have recovered interest upon this money; and we see no reason why in an action of covenant he is to be placed in a better situation. It is not requisite to decide whether, if the jury had given interest, their verdict could be sustained; the question is, whether the judge was bound to direct them to give interest? and we think that the cases referred to are decisive to show that he would not have been warranted in so doing.—Rule discharged.

10th. Money had and received.

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1. WALKER v. CONSTABLE. T. T. 1798. 1 B. & P. 306.

This was an action on the case. the first count in the declaration stated, that the plaintiff had contracted with the defendant for the purchase of an estate, had paid a deposit of 860*l.*, and had incurred a considerable expense in examining the title; that in consideration of the premises, and that the plaintiff and defendant had agreed that the said contracts should be at an end, and the said intended purchase be abandoned, and that the plaintiff would receive back his aforesaid purchase money, the defendant undertook to pay interest on the deposit money from the time of its being advanced to the time of its being repaid, and also the costs and expences of examining the title. There was also a count for money had and received. Plea general issue. The Court were of opinion, on the authority of *Moses v. Maiferlan*, 2 Burr. 1805. that in an action for money had and received the plaintiff could recover nothing but the net sum received, without interest.—Rule discharged.

See 1 Blac. 599; 3 Burr. 1921.

2. DE BERNALES v. FULLER. H. T. 1810. N. P. 2 Campb. 426.

It was insisted that A. was entitled to interest upon 894*l.* 16*s.* 9*d.* from the 23rd of September to the time of signing and final judgment, which amounted to 28*l.* 13*s.* This was a liquidated demand payment had been requested; the

Interest is not recoverable in an action for money had and received.

Even where it is paid into defendant's hands by a

third person expressly for the plaintiff's use.

defendants had no doubt made interest of the money. The plaintiff certainly would have turned it to advantage had it been duly paid to him; therefore, according to the rules of justice and of law, the plaintiff was entitled to a compensation in the shape of interest for the injury he had suffered by the money being withheld from him; but

Lord Ellenborough decided that as there was no contract, either expressed or implied, to pay interest in this case, interest could not be allowed. His lordship again laid down the rule as it is stated in *De Havilland v. Bowerbank* 1 Campb 50; and having no doubt upon the point, refused to save it, but requested the Attorney General, if he thought the direction erroneous, to bring the matter before the Court. The judges all agreed that interest ought not to have been given. Le Blanc, J., mentioned with disapprobation the circumstance of Mr. Justice Buller having allowed interest on policies of insurance, and said that the debt being liquidated, was not now the rule by which interest was recoverable.

3. CROCKFORD v. WINTER. M. T. 1807. N. P. 1 Campb. 129.

And the circumstances of the money having been obtained fraudulently will not vary the rule.*

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Money had and received. On the 20th of November, 1790, Ann Watson made her last will: whereby she gave and bequeathed 500*l.* three per cent. consolidated annuities to trustees (of whom the plaintiff is the survivor) in trust, to pay the interest and dividends thereof unto her daughter, Elizabeth Troup, wife of James Troup, during the term of her natural life; and the like sum, in trust, to pay the interest and dividends thereof unto Ann Winter, the testatrix's other daughter, wife of William Winter, during the term of her natural life; and upon this further trust, that upon the decease of each or either of them, the said Elizabeth Troup or Ann Winter, the said trustees should sell the said 500*l.* so given to each of them for life, and pay and divide the same equally to and amongst the separate and respective children of the said Elizabeth Troup and Ann Winter, share and share alike as they should severally attain their respective ages of twenty-one years. The testatrix died soon after making her will. In August, 1804, Ann Winter, having been some years dead, the defendant, her son, came to the Bank of England, and claimed, as being her only surviving child, and having attained the age of twenty-one, to have the 500*l.* three per cent. transferred into his name. He was told, it was necessary to produce a certificate of the marriage of his mother with William Winter. A certificate was in the sequel produced accordingly, purporting to be signed by Rev. William Hague, and stating a marriage to have been celebrated by the Rev. John Hogarth, on the 11th day of March, 1782, at the chapel of All Saints, in Newcastle-upon-Tyne, between, William Winter, of the parish of Clapton, in the county of Northumberland, and Ann Watson, spinster, of the said chapelry in the presence of Robert Longstaff and Margaret Fitzpatrick, attesting witnesses to the register. The Bank officers still required an affidavit of the genuineness of this certificate; upon which, William Winter the father, went before the Lord Mayor, and swore that he had seen it copied from the register, and signed by Mr. Hague. A regular certificate of the defendant's baptism having been likewise furnished, the stock was transferred into his name, and he soon after sold it for 284*l.* 7*s.* 6*d.* To recover this sum, with interest, was the object of the present action. On the part of the plaintiff it was proved that the certificate of the marriage was a forgery. William Winter the father, had obtained a certificate from the curate of All Saints, in Newcastle, regularly taken from the register of that chapelry, of the very same tenor; except that the names of the parties stood John Hastings and Ann Wilson. This he had copied with great nicety, substituting his own name and that of Ann Watson, his supposed wife. The plaintiff's case being closed, however, there were various contradictions in the evidence of both the witnesses; and the jury found that there had been no marriage. The plaintiff had a verdict for the produce of the stock; but Lord Ellenborough would not allow interest,

* Lord Tenterden has refused to allow the general question of whether interest is payable under a count for money had and received, to be agitated at Nisi Prius; see 3 O. & P. 112.

saying, that the fraud did not take this case out of the rule he had formerly laid down.

11th. *Money Lent.*

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CALTON v. BRAGG. H. T. 1812. K. B. 15 East, 223. S. P. SHAW v. PICTORS. M. T. 1825. K. B. 7 D. & R. 201; S. C. 6 B. & C. 715.

Action for money lent, money paid, money had and received, and also upon account for interest due to him for the forbearance of sums of money before then lent and advanced by him to the defendant, and paid, laid out and expended for his use, and had and received by the defendant to the use of the plaintiff, &c. It was stated at the trial before Bayley, Justice, that there had been a running account between these parties, in the course of which the plaintiff had supplied the defendant with goods, and had also lent several sums, at different times, to the extent, on one occasion (as it was now stated in court) of 100*l.*; the balance of the account, however, had been paid by the defendant to the plaintiff for the goods sold and the money lent, but not for interest on the latter, which balance the plaintiff had received, saving his claim for interest, to recover which this action is brought; and the learned judge directed the jury to find for the plaintiff for the amount of the interest proved, which was thirty-five pounds, reserving the question for the opinion of the court whether interest was by law due, or could be recovered in such a case? and the defendant's counsel had liberty to move to set aside the verdict and enter a nonsuit. This motion was accordingly made, and a rule to show cause granted.

Interest is not allowable by law upon money lent, without a contract for the payment of it, either express or implied.

Per Cur. There was no evidence of any course of dealing between the parties, from whence it might be inferred that interest was tacitly agreed to be taken. Lord Mansfield sat here for upwards of thirty years, Lord Kenyon for above thirteen, and we have now sat here for some years; and during this long course of time, no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of a principal at a certain time, or for interest to run immediately, or under special circumstances, from whence a contract for interest was to be inferred, has interest been ever given. The mere form of the count cannot make any difference in this respect, for in most cases it happens that a plaintiff may either frame his count for money had and received, or for money lent. If interest were due in this case, why should it not also be due where goods are to be paid for at a certain day when that time arrives? as Baron Montague in one case is stated to have held, or in any other case where money is to be paid at a certain day. Those cases press closely upon the present. If there were any general rule for interest to run upon the money due, why should it not be allowed upon all book debts? Juries would give ear readily to such a direction; but we dare not vary from the practice which has long prevailed in all the courts in Westminster Hall. If it be fit that the whole course of our proceeding in respect of giving interest should be recast, it must be done by act of parliament. Where one directs his agent to advance money to another, what difference can it make, as to the point of interest, whether he afterwards counts for money had and received, or for money lent? If interest were demandable generally upon money due, why should it be thought necessary to introduce, as it has prevailed in practice, a particular count for interest agreed to be paid, where the law would have given it without such an agreement? But in fact there has been no instance of its being allowed except upon written securities for the payment of money at a given time, or upon an express or implied agreement for it. The judgment of Lord Mansfield in the case of Robinson v. Bland, and of the eminent judges who sat with him, show that interest is not due without a contract for it; for they would never have resorted to the argument of intention to be collected from their giving a void bill of exchange in order to support the claim of interest, if the law would have given without upon the mere loan of money. Where a balance has been settled upon an allowance of interest in a banker's books, that is an admission by the party of a contract to pay interest on the sums advanced to him by the banker. The cases in equity also show the understanding which has prevailed upon this subject, not only in those courts, but also in the courts

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of law, as Lord Alvanley, when he was master of the rolls, states in *Parker v. Hutchinson*, that he had received the rule there laid down from Lord Kenyon as derived from the practice adopted at the sittings at Nisi Prius. It was said indeed, in *Blaney v. Hendrick*, that interest is due upon all liquidated sums from the instant the principal becomes due and payable. But those words must be taken in a restricted sense, and we must understand by them something more than an account stated. If an account be stated, and the nature of the transaction be such as to afford evidence of an agreement for interest, as if it be shown to have been allowed before on a prior settlement of accounts, then it may be warranted. But if it be understood as extending the claim of interest upon money lent generally, without any certain time of payment, or any agreement for interest, expressed or implied, we shall expect a body of authorities more strong and consistent than has yet been brought forwards before we can venture to say that it is allowable by law. Hitherto it has only been allowed upon written contracts, express or implied, for the payment of interest. If it be fit that the rule should be carried further, it must be done by the legislature.

12th. Money paid.*

13th. Tender.

DENT V. DUNN. M. T. 1812. N. P. 3 Campb. 298.

Interest is not, in general, recoverable after a tender has been made, even in action on a bill or note.

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Action on two promissory notes made by the testator. It appeared that in the year 1805, after his death, the defendant gave her agent a sum of money for the purpose of taking them up. The agent went to the plaintiff, and offered to pay him the principal and interest, on having the notes delivered to him. The plaintiff having then mislaid them, could not comply with this condition. The agent afterwards failed, with the money in his hands. The notes were not discovered till a short time before the commencement of this action.

Lord Ellenborough. I think interest ought to stop from the offer to pay. Interest, properly speaking, is a compensation agreed to be paid for the use of money forborne by the lender at the borrower's request. It is more frequently recovered in the shape of damages for money improperly retained by the debtor contrary to the request of the creditor. But in neither of these ways can interest continue to run after an offer to pay the principal, upon a reasonable condition, which the party to receive it refuses, or is not in a situation to fulfil.

14. Work and labour.

TRELAWNY V. THOMAS. M. T. 1789. C. P. 1 H. Bl. 303 S. P. NEILSON v. HAYWARD. M. T. 1818. Ex. 9 Price, 134.

The jury cannot in a civil action include interest in the amount of their verdict in an action for work and labour.

Assumpsit for work and labour: the common money counts. The cause was twice tried, and on each trial the plaintiff recovered a verdict, on the latter for the amount of the money advanced by him for the purposes of the election, viz. 44*l.* with interest, together with a certain sum for his attendance.—The substance of the evidence on the part of the plaintiff, as it appeared on Lord Ellenborough's statement of it, was, that the defendant, who was a member of the committee at Bristol, for carrying on the election in favour of Peach and Cruger, had taken upon himself an active part in engaging the plaintiff to advance money, and attend in collecting voters resident in London, and conveying them to Bristol. On the other hand, the defendant endeavoured to prove that he acted merely as the agent of Peach and by his authority; for which purpose he called, besides other evidence, two witnesses, Lediard and Ewbank; but they being examined on the *voir dire*, Ewbank said he had given a bond to Peach for payment of a sum of money, which it was understood between them was to be applied towards indemnifying him from the expenses of the election, and Lediard acknowledged that he had entered into a written agreement to the same effect. From this account Lord Ellenborough thought that they were interested in the event of the cause; inasmuch

* Where a party expended money at the desire of the defendant, he cannot recover interest in the absence of an express contract to that effect; see *Carr v. Edwards*; 8 *Starke* 433; 2 B. & P. 467.

as by procuring the plaintiff to be nonsuited, or a verdict against him, they would save themselves from the consequences of this action; since, if he gained a verdict, as the defendant would call upon Peach to be reimbursed the damages and costs, they would be liable by their engagements to Peach; and if the plaintiff, having failed in this action, should bring another against Peach, they, the witnesses, might tender to Peach the amount of the plaintiff's demand, and thereby escape the costs; for if Peach should proceed against them on their securities, he would be restrained in equity from having execution for more than the damages recovered by the Plaintiff in the former action, which would have been tendered. *Per Cur.* In this case there was no evidence at all of there being any committee who had money of their own contributing to pay towards the expense of the election; on the contrary, the evidence on the part of the defendant proved the negative of that proposition. There was a committee managing the election for the absent candidate; Mr. Cruger; and Mr. Peach, one of the candidates, has an engagement on the part of Mr. Ewbank to pay simply a sum of money; but Ewbank declares that the consideration on which he had given that bond, and what would make the real debt between Peach and him, was the application of so much of that sum as should be necessary towards the expenses of the election, in relief of Peach, the partner of Cruger. The other witness, Lediard, entered into an agreement which he states to be of exactly the same effect, for the payment of money, which he understood to be for the election. Now they seem to us to have the most direct interest in the event of the cause; not that the verdict could be evidence on which the money could be demandable on them, but in the persuasion of their own minds, that the difference of the cause was just so much to them in the proportion of the costs. It is certainly sufficient from the case in *Strange*, that the witness think himself interested, though in point of law there could be no recovery against him. Now if he discloses the nature of his interest, and honestly says what that interest is; according to his own conception of it, and it is an interest which by immediate and necessary consequence must subject him to the costs in the action, it would be strange to say that it was indifferent to him whether the defendant or plaintiff recovered.—Certainly, in point of law, these witnesses must pay the money due on their agreement; but it is equally certain that Peach would have execution for more than he could state to be paid by him for the expense of the election.—The 4*l.* due to the plaintiff Trelawney is money advanced towards the expense of the election. In case he recover, the obligation to pay the 4*l.* and all the costs of this, and the other action attaches, which in that respect became part of the expenses of the election. If the plaintiff had been nonsuited, they might have tendered the two sums to each, and thrown on him the costs. With regard to the question, how far collateral interest in the same cause will affect the parties so as to reject their evidence, we are at loss for a settled and known rule. The cases have differed very widely upon it. As to the question relating to the interest on the money, we remember a case (2 Black, 761; 3 Wils. 205.) extremely well, where, on a writ of inquiry, the jury, on assessing damages, found interest for money lent. The counsel applied to set aside that inquisition, on the ground that the giving interest was not warranted by any precedent. A case was then cited from Bunbury's Reports (Bunb. 119.) in which the Court were of opinion, that for money lent interest should be recovered; and the motion was refused. Now money laid out for the use of another, and money lent to him, seem to stand precisely on the same ground with respect to reason, justice and equity. As far, therefore, as interest was assessed with respect to the liquidated sum, we think the verdict perfectly right, and ought to be sustained. As to the sum for day's wages, certainly in our apprehension, no interest ought to be allowed; and this distinction is made in the case of Bunbury, that for goods sold and delivered, or work and labour, no interest ought to be allowed; otherwise of money lent. But there is a known and usual method of remitting damages of this kind. We are therefore of opinion, that there ought not to be a new trial.—Rule discharged.

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Where money on a balance of accounts, is awarded to be paid, and paid on a particular day at a specified place if duly demanded there on the day, it carries interest after wards. So, it is payable on a sum awarded by a jury under a statute directing a compensation to be made to persons for losses sustained by buildings being taken down for the purpose of public improvement.

(B) ON SPECIALTIES.

(a) On an award.

1. PINHORN v. TUCKINGTON. M. T. 1813. N. P. 3 Campb. 466.

Action for non-payment of money, pursuant to an award, whereby the defendant was ordered to pay to the plaintiffs the sum of 1,950*l.* due on a balance of accounts, on the 21st of June, 1812, between the hours of eleven and twelve at Lloyd's Coffee-house. The question being put, whether interest was recoverable on the award? Lord Ellenborough held, that as the money was awarded to be paid on a certain day, interest ought to be allowed from that day if payment was then demanded at the place appointed.

2. HILHOUSE v. DAVIS. H. T. 1813. K. B. 1 M. & S. 169.

In an action of debt to recover a sum awarded to the plaintiffs by a jury, under the 43 Geo. 3. c. 140. and 48 Geo. 3. c. 11. as a compensation, to be made by the British Dock Company, for an injury done to the plaintiffs' property by means of the works authorized by those acts, the judge directed the jury that they might give damages for the detention of the debt, and that the natural criterion of those damages was the interest on the sum awarded by the jury; whereupon the jury found a verdict for the debt and damages, which included the sum awarded. It was contended, that the assessment made under the act of parliament was equivalent to a judgment. The first act relating to these docks gave jurisdiction to the sessions, who were directed to enter the judgment; then came this act, which gave the same jurisdiction to a judge of assize. Here the judge has accordingly pronounced judgment, and that judgment is conclusive. The jury, therefore, were at liberty to give interest in an action brought upon it, in the same manner as it has been held they may do in actions brought upon regular judgments; see *Entwistle v. Shepherd*, 2 T. R. 78; *McLuse v. Dunkin*, 1 East, 436; in which latter case, the interest given exceeded the penalty of the bond, and therefore could not have recovered in the original action. *Per Cur.* The jury having given interest, we cannot set their verdict aside without being satisfied that they have done what they were not warranted to do by law. But there is no positive rule of law against their giving interest on a sum ascertained. The rule of law is affirmative, that where a sum is ascertained, and judgment afterwards pronounced thereon in a court of record, if an action of debt be brought on that judgment, the jury may give interest by way of damages for the detention of the debt. The only question is, whether this may be assimilated to the case of an action on a judgment?—and I think it fairly may. This was a statutable provision, to relieve the company from actions for damages to be done by them in the execution of the act. Now if, in this instance, an action had been brought, the plaintiff would have recovered damages to the extent of the injury, and had judgment for those damages; but the legislature has appointed another course of proceeding—by assessment of damages before a judge of assize, who is afterwards to give judgment as a sanction to the finding of the jury. It is an assessment *in invitum*, and the party in whose favour it is made has no mode of recovering it but by action of debt, and proceeding to judgment in a court of record upon that assessment; and then he may go on, as in other cases, from the time of the ascertainment by the jury and the sanction of the judge. It seems marked out as a stage of the proceeding corresponding with that of a judgment recovered in an action; and, therefore, by analogy to that, it should seem that the sum ascertained will bear interest.—Rule discharged.

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3. LEE v. LINGARD. E. T. 1801. K. B. 1 East, 401.

On the 25th of August last, the arbitrator made his award, whereby he directed the defendant, on the 12th of November following, to pay to the plaintiff 1,071*l.* 16*s.* 1*d.* The defendant not attending as required to settle the demand, the plaintiff proceeded to tax his costs before the master at 149*l.*, and signed final judgment on that day for the said sum of 1,200*l.* for which the verdict was taken, 40*s.* costs, and 147*l.* increased costs; making together 1,349*l.*; and on the 17th of November executed a writ of *fieri facias*, indorsed to levy 1,224*l.* 3*s.* besides officer's fee, sheriff's poundage, and other expenses; which

sum of 1,224*l.* 3*s.* consisted of the following items:—amount of debt upon the that sum, award, 1,071*l.* 16*s.* 1*d.*; interest thereon from the 12th to the 26th of November, 1*l.* 18*s.*; costs taxed, 149*l.*; *fiery facias*, 16*s.* 6*d.*; test *fiery facias*, 11*s.* 6*d.*; warrant and messenger, 3*s.* 6*d.*; letters to the under sheriff, and postage, 3*s.* for the in 6*d.* In addition to these sums he retained what he had levied, 33*l.* 2*s.* for his interest there poundage. Thereupon the defendant obtained a rule, calling on the plaintiff on. to show cause why the writ of *fiery facias* executed in this cause should not be set aside with costs, and the money levied, and poundage thereon be returned to the defendant. *Per Cur.* There is no foundation for the additional charge for interest on the sum awarded. Wherever interest is intended to be given, it forms part of the damages assessed by the jury, or by those who are substituted in their place by the parties. Also the items for sheriff's poundage, and the other fees of the levy, must be struck out of the account; the defendant is not liable for any such charges. With respect to the principal question, we do not find, upon reference to the master, that there is any such settled practice as that which has been supposed, requiring a plaintiff, for whom a sum has been awarded under such rule of reference as the present, to apply first for the leave of the Court before he can enter up his judgment for the sum so awarded. Upon principle it appears to us not to be necessary. It is often a matter of convenience, and in furtherance of justice at Nisi Prius, where matters of account between parties are to be investigated to refer the amount to be settled by an arbitrator, who may have more time and opportunity to make the inquiry, and arrive at a proper conclusion, than a jury are able to do: a verdict is therefore taken *pro forma*, subject to the award of the arbitrator; but after the arbitrator has ascertained the sum to be recovered, such sum is in place of the verdict, and must be considered the same as if the jury had originally found so much to be due; and then all the same consequences ensue. The plaintiff is only entitled to enter up his judgment for so much, and the sum for which the verdict was nominally taken cannot be considered as in the nature of a penalty for which the plaintiff is entitled to enter up judgment. If the jury had, in the first instance, given their verdict for the sum awarded, the plaintiff would have been entitled to enter up his judgment after the four first days of the ensuing term, and then he would have been entitled to sue out execution immediately afterward. A pause is allowed for those four days to the party to whom this verdict was given, in order to afford him an opportunity of applying to the Court to rectify any mistake which may have been committed. Here the defendant has had the benefit of a longer delay; for final judgment was not entered till the 14th of November. The award was in the place of the verdict of the jury; and as there is no rule of practice obliging the party to apply to the Court for leave to enter up judgment for the sum awarded, we see no reason for making such a rule now. Therefore, subject to the deductions which have been mentioned, let the execution stand: but inasmuch as there has been an excess in levying more than the defendant was bound to pay, and to remedy which he was compelled to apply to the Court, we think he is entitled to be allowed the costs of this application.

(b) Bond.

1. *FARQUHAR v. MORRIS*. H. T. 1797. K. B. 7 T. R. 124. Debt on bond, dated on a day certain, in the penal sum of 800*l.*, conditioned to pay 1,100*l.*, but no day of payment was expressly named, nor interest reserved in terms. The defendant before plea pleaded, obtained a rule of reference to the master, grounded upon the 4 Anne, c. 16. s. 13. to compute what was due for principal, interest, and costs, and on payment of the same to stay the proceedings. The master doubted whether he was authorised to proceed in this inquiry, because the 12th section of the act speaks only of "any bond which hath a condition or defeasance to make void the same on the payment of

Interest is due on a bond conditioned for the payment of a lesser sum though not expressly reserved.*

* So in an action on a bond in the penalty of 120*l.* conditioned for the repayment of the same sum with lawful interest, interest is recoverable beyond the penalty to the amount of the damages laid in the declaration; see *Nones v. Wilson*, 1 R. & M. 105,

a lesser sum, at a day or place certain;" and the 13th section, upon which the rule was obtained, is confined to "any such bond."

Per Cur. This bond is payable at a day certain; for it is payable on the day of the date, no other time being mentioned for payment.

2. HOGAN V. PAGE. M. T. 1798. C. P. 1 B. & P. 337.

[612] It was moved to stay proceedings on a single bond. The Court were clearly of opinion that no interest ought to be given, and made the rule absolute.

(c) *Mortgage deed.*

Interest is
covered
in debt
on a mort-
gage deed.

1. VERNEY V. INDINGS. 1817. K. B. 2 Chit. Rep. 234.

Demurrer in an action of debt on a mortgage deed, upon a covenant therein for payment of 886*l.* and interest, alledged to amount to 940*l.* The special demurrer assigned for cause, that 940*l.* were alledged to be due and owing; and such sum could not be due, because the date of the deed as shown was the 20th of January. It was objected that an action will not lie for interest. *Per Cur.* This is a general demurrer, and you must show that no judgment can be given upon the declaration, and that nothing can be recovered. The demurrer is too extensive. If the interest is uncertain, the Court will only give judgment for 886*l.*, and then there will be an application to the Court to refer it to the master to compute the principal and interest, and the interest will be given, not as interest, but as damages for the detention of the debt; and so the interest, if uncertain, and therefore cannot be recovered as interest, will be made certain, and reserved as damages.

2. ORR V. CHURCHILL. E. T. 1789. C. P. 1 H. Bl. 227.

A bond re-
cited that
A., having
received
from D. a
certain sum
of money
in the East
Indies, had
drawn bills
of ex-
change pay-
able to D.
on a house
in England,
and that
the obligors
had agreed
with D. if
the bills
should not
be accept-
ed and paid
that they
would pay
the amount
thereof
with inter-
est thereof
from the

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day of their
respective
dates by
way of pe-
nalty on
the bills not
being paid;
it was hold-
en that D.
was only
entitled to
recover in-
terest from

A bond was entered into by A., B., and C. to D., reciting that A., having received from D. a certain sum of money in the East Indies, had drawn bills of exchange there, payable to D. on a house in England, and that the obligors had agreed with D., if the bills should not be accepted and paid, that they would pay the amount thereof, with interest from the day of their respective dates by way of penalty. Lord Loughborough. We are all agreed in this case, in which the question is, whether the verdict shall be entered for the whole sum, at which the damages are assessed, by the consent of the parties, namely, 1,459*l.*, or 1,275*l.* 16*s.* 3*d.*, the difference of the two sums being owing to the computations of interest from the date of the bills of exchange? It was argued that the verdict ought to go to the full extent, because, by agreement of the parties, the damages were liquidated, and that this was not in the nature of a common penalty, but the damages being ascertained, neither a court of law nor of equity would relieve. But I do not go on the denomination given by the instrument; for whatever that may be, in this case there could not, by any possibility have been an agreement for liquidated damages which can only be where there has been an engagement for the performance of certain acts, the not doing of which would be doing an injury to some of the parties; or to guard against the performance of acts which, if done would also be injurious. In such cases, an estimate of the damages may be made by a jury, or by a previous agreement between the parties, who may foresee the consequences of a breach of the engagement, and stipulate accordingly. But where the question is concerning the non-payment of money, in circumstances like the present, the law having by positive rules fixed the rate of interest, was bounded the measure of damages, otherwise the law might be eluded by the parties. It may often, indeed, happen, that the damages sustained by a party contracting, by the non-payment of the money at the time agreed on, may, by the particular arrangement of his affairs, be greater than the compensation recovered by computing the interest; but where money has a real rate of interest and value, the other party is not to be compelled to pay more than the law has declared to be such rate and value. In this transaction, the money was not a loan to the defendant, to remain in his hands in India, and to be re-paid to the plaintiff at certain stated times; but it was paid merely for the purpose of being remitted to Europe. That it was so paid, clearly appears from that part of the agreement, which provides that, if the bills were sent back unpaid to India, the amount of them should be paid to the plaintiff in pagodas, at an exchange of 70 cr. for each pagoda, and 10*l.* pe

cent. interest, which must be on account of the difference of exchange.—the time When the plaintiff could not procure bills on the East India Company, he had others on a private house, and as a security took a bond from the defendant, with two other persons, to answer the value of them. But for the reasons we have stated, we think that the value might be calculated from the times when the bills became due; that the verdict must therefore be reduced, and entered for a lesser sum.

3. *DECHEMON v. HARRISON*. T. T. 1817. C. P. 4 Price, 282.

Declaration in debt for 800*l.*, on a covenant (in a mortgage deed for securing payment on a future day certain of that sum and interest) that the defendant would pay the said sum of 800*l.* with interest on, &c.; breach, that he did not, nor would, pay the said sum of 800*l.*, &c. On special demurrer, because there was no averment that the interest had been satisfied, or that the plaintiff abandoned his claim thereto; *Per Cur.* Notwithstanding a great many cases have been cited in support of this demurrer, we think them all distinguishable from the present; and that the objection which has been raised by it is not on any ground sustainable. In the deed, as set out in the declaration, there is the usual covenant that the defendant would pay the plaintiff the sum of 800*l.* and also something more at the same time, which was the interest, and that is equivalent to a covenant to pay two distinct and independent sums of money. The breach is, that nevertheless the said defendant did not, nor would, pay the said sum of 800*l.* on the day and time mentioned and appointed for payment of the same. In all probability the interest has been paid down to the time; afterwards there must have accrued some further interest, but that can be recoverable only in the way of damages. The question on this demurrer amounts in truth to this; whether, when two distinct sums are due to the same person on the same day, under the same instrument, he may not sue for either; at his election; or, whether he is therefore necessarily compelled to proceed for both in the same action? We are of opinion that he might sue for either; and in the present case we think the sums are completely distinct and unconnected, notwithstanding they become due by the same instrument; and that they may therefore be separated by a plaintiff who sues to recover them, so as to be made the subject of separate actions. The decisions that have been cited were on all cases where the debt was one entire demand; and we agree that where that is so, you must aver in your declaration, if you proceed for a part of the debt, that the rest has been satisfied; as if in this declaration in debt for 800*l.*, after having set out the covenant, the plaintiff should have gone on to state, whereby an action hath accrued to him to demand and have of and from the said defendant 700*l.*:—that would have been an obvious and palpable defect, which would, undoubtedly, have been therefore bad. But that is not so here, or anything like it: he demands strictly the integral sum of 800*l.*, and that is a good demand; for the other sum is distinct and separable, and need not be demanded by the declaration, or shown to have been satisfied. We are therefore of opinion that this declaration is properly drawn. It certainly might have been made more formal, but that was by no means necessary; therefore there must be a judgment for the plaintiff.

(d) *Replevin bonds.*

ANON. T. T. 1811. C. P. 4 Taunt. 30.

Motion for interest upon a judgment recovered on a replevin bond, which had been given on a distress made for the recovery of the arrears of a rent charge; the assignee of the replevin bond had recovered the amount of the rent due. The Court held that interest was not to be given for rent, and refused the application.

(C) ON RECORDS, JUDGEMENTS, AND DECREES.

(a) *Decrees.*

ARNOTT v. REBBERN. H. T. 1826. C. P. 3 Bing. 353; S. C. 2 C. & P. 88.

The plaintiff declared in *assumpsit*, on a judgment obtained by him against the defendants in the High Court of Admiralty in Scotland, by which the judge of that court "found, that by accounts made up by the plaintiffs, there was due to him from the defendants a balance amounting to 236*l.* 6*s.* sterling, and

And as it is viewed as damages, it need not be averred in the declaration for the principal sum to have been paid.

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Interest is not recoverable on a replevin bond.

No interest is payable upon a decree in Scotland, founded upon a

contract made in England, which would not bear interest here.*

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decreed and ordained the defendants to make payment to the plaintiff of the said sum of 236*l.* 6*s.* sterling accordingly, with interest thereon from the 16th of March, 1811, till paid; with the sum of 30*l.* 4*s.* 2*d.* sterling being the modified expenses found due; and also 1*l.* 10*s.* 1*d.* sterling, being the fees of extracting that decree and stamp." There was also in the declaration the usual money counts, and a count upon an account stated. Plea, general issue. The defendants, wholesale grocers in London, wishing to extend their trade to Scotland, employed as their agent the plaintiff, who lived at Lieth, under the terms of the following letter, which was written by him in London: "I have no objection to conduct your concerns in Scotland should you approve thereof, by a few lines confirming the terms below stated; viz. I shall make a point of going my journeys regularly according to the routes left with you, to sell, and call at, and remit regularly, all money received upon such; and also, will guarantee one fourth-part of such sales, and allow my whole commission to stand over, for the purpose of making up any deficiency, if any, so far as the said fourth part of the real loss. This I do, upon your paying me one per cent. upon the whole sales made in Scotland, or goods sent by your house, and one-half per cent. more upon said gross amount, as a compensation for said one-fourth guarantee; all postages, carriage of parcels, &c., to be paid by you; that is, one-and-a-half per cent. on the whole amount for commission and guarantee. At London, 17th of September, 1808." In 1811 the defendants discontinued their business in Scotland, but the plaintiff's accounts were not finally made up till 1815. In 1818 he obtained upon these accounts, in the High Court of Admiralty of Scotland, the judgment set out in the declaration. In 1819 he commenced the present action, which was stayed in consequence of his not complying with a rule of the defendants, calling on him to give security for costs, he being out of the jurisdiction of the Court. In 1825 he came to reside in London, and proceeded with the action. The Scotch judgment was put in and proved. It was objected on the part of the defendant, that the contract on which the plaintiff sued was made in England; that the English law did not allow interest on such a claim as that which had arisen out of this contract, and that the Courts here were not concluded by the judgment of the Court in Scotland. The jury then, under the direction of the Chief Justice, found a verdict for the debt, excluding the interest, with liberty for the plaintiff to move to increase the damages, by adding thereto such a sum of money as the Court should direct for interest. The Court held that where, after the creditor has endeavored to obtain payment, there has been a wrongful withholding of a debt arising out of a contract which does not carry interest, the jury may allow interest in the shape of damages for unjust detention of the money. But in this case no interest attached.

(b) *Judgments, English.*

1. THOMAS V. EDWARDS. M. T. 1797. Exch 3 Anstr. 804

Debt on Judgment. It was referred to the master to compute what was due for the debt and costs: in taking the account he refused to allow interest on the judgment. A rule to show cause why the matter should not be referred back to the master, with directions to allow interest. It was contended that almost the whole sum due on the judgment was for costs; the allowing interest on which is questionable, 14 Vin. Abr. 458. c. 9; at most it is discretionary in the Court. The Court were of opinion that the whole debt due on the judgment carries interest.

2. BUTLER V. STORELD. M. T. 1823. C. P. 8 Moore, 412; S. C. 1 Bing. 368.

This was an action on a judgment for damages, recovered in *assumpsit*, upon a special agreement, into which the defendant had entered as surety, for the purchase of 901 oak trees, at 10*l.* 5*s.* per load. The judgment had been suspended, by injunction out of Chancery, for about two years; and after the commencement of the present action, the defendant's attorney applied to a

Where a judge has made a rule for [616] staying proceedings in an action upon a judgment

* Where a Scotch decree adjudged interest to be paid, but did not fix the time from which it was to be calculated, the Court held, that it was payable from the day of the citation; see 1 C. & P. 668; S. C. 4 Bing. 686.

judge at chambers to stay the proceedings in the action on payment of the sum recovered and costs. Some question arose as to the plaintiff's right to interest on the judgment, but the learned judge having decided that it was a case in which interest was not claimable on the judgment, an order was made for staying the proceedings on payment of the sum recovered and costs only; which the plaintiff accepted. It was now moved for a rule to discharge this order, and allow the plaintiff to proceed; contending that interest was due on a judgment for damages, where the damages were meant to cover a specific sum, settled by previous agreement. *Per Cur.* The plaintiff should have refused the sum tendered at the judge's chambers if he meant to persist in his claim for a larger sum.—Rule refused.

(c) *Judgments, foreign.*

1. *ATKINSON v. BRAYBROOKE.* H. T. 1816. N. P. 4 Campb. 380.

Action on a judgment of the Supreme Court of the Island of Jamaica, and the only question was whether the plaintiff was entitled to interest?

Lord Ellenborough. This judgment constitutes only a simple contract debt. I am of opinion that no interest can be allowed.

2. *DORON v. O'REILLY.* M. T. 1816 Exch. 3 Price, 350.

On error in an action of debt on a foreign judgment, for an entire sum plaintiff had recovered on counts for the balance of a merchants account for goods sold, monies advanced and paid, monies due on bills of exchange, and for interest. *Per Cur.* We should not be warranted in granting this application. In those cases where we give interest on judgments affirmed it always appears on the face of the record, that the demand of the plaintiff below is of a debt that bears interest of course, as in the case of a bill of exchange or promissory note. The first count of the declaration in the foreign court is for goods sold. On that demand no interest could be due, and therefore none ought to be recovered. Besides, we are called upon to do this on facts stated in an affidavit, which would be a mischievous precedent; all those facts might be false, and if they should be so, the party who is to be fixed with them can have no opportunity of contradicting them.

(d) *On recognisance of bail.*

ANON. H. T. 1813. C. P. 4 Taunt. 722.

It was moved for interest on the affirmance in error of a judgment obtained on a recognisance of bail, in the Court of King's Bench. The Court refused it on account of the difference between the form of the recognisance in the Court of King's Bench and that in the Common Pleas, being in the King's Bench confined to the amount of the debt.

(e) *Verdict.*

SARROLD v. REEVE. M. T. 1828. Exch. 8 Price. 582.

This was an application for a rule to compute interest and costs, on a sum recovered by verdict, up to a given period, during which the plaintiff had been delayed by every possible expedient and proceeding for two years and a half, made on an affidavit stating the circumstances, and which made out a case of unparalleled delay and vexation, by which the plaintiff was put to an expense in costs of upwards of 1,000*l.* in an action on bills of exchange. It was admitted that the application was novel in practise but it was submitted to be reasonable and just under the extraordinary circumstances disclosed in the affidavit on which it was founded. The Court, however, refused the motion.

IV. REMEDIES FOR THE RECOVERY OF INTEREST.

1. *HERRIES v. JAMESON.* E. T. 1794. K. B. 5 T. R. 553.

On a writ in debt for 1,066*l.*, plaintiff declared for 1,000*l.*, borrowed by defendant of plaintiff, and on a second count for 66*l.*, and for interest of money lent by plaintiff to defendant. Defendant pleaded in abatement of the writ, interest.

* And in an action on an Irish judgment, the question, whether any and what interest is recoverable, is a question for the jury, under all the circumstances of the case: and in deciding this question they will have to consider, whether the plaintiff has taken proper steps to find his debtor, and follow up his judgment by an execution, or whether he has been guilty of laches: C. & P. 376.

that "the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from plaintiff," was borrowed by defendant and others, and not by defendant separately. On demurrer, because this plea answered only one of the causes of action (that mentioned in the first count), the Court held the plea bad; but that debt will lie for interest of money.

2. *BERESFORD V. BIRCH*. T. T. 1824. N. P. 1. C. & P. 373.

Interest due from assignee for detaining a balance divisible among the creditors, cannot be recovered in *assumpsit* on the common count.

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The plaintiff claimed a sum of money, together with interest, at the rate of 20*l.* per cent. in pursuance of the statute 49 Geo. 3. c. 1. s. 4., which enacts, that if the assignees of a bankrupt shall retain in their hands, or otherwise employ for their benefit, any money, part of the bankrupt's estate, contrary to that act, and the 5th Geo. 3. c. 30. they shall be charged in their accounts, interest at the rate of 20*l.* per cent. per annum on all money so retained, for the time it is so retained, contrary to the said acts, and that the commissioners shall charge such assignees with such sum accordingly.

Abbot, C. J. I think, in order to charge a man with interest at 20*l.* per cent. there should be a count framed upon the act. If, indeed, it applies to the case of an action, and is not merely directory as to what is to be done when the matter is before the commissioners, I should think it a case for 5*l.* per cent. interest. But this interest at 20*l.* per cent. is in the nature of a penalty; and I think you must declare specially as for a penalty. If the commissioners had settled an account, and charged the defendant with such interest, then the case would have been different.

3. ——— *V. EDMUNDS*. M. T. 1815. C. P. 6 Taunt. 346.

When a writ of inquiry is executed, interest ought to be allowed, subject to the same rules as observed at the Court of Westminster.

Motion for interest of the affirmance in error of judgement which had passed against the defendant by default in the court below, in an action upon a special undertaking of the defendant, who was an attorney, in consideration of the plaintiff's countermanding notice of trial in a certain cause to pay on or before the first day of June the sum of 64*l.*, and the taxed costs of that action. The sheriff's jury on executing the writ of inquiry in this case had not given interest. It was said that it was their practise never to give interest upon the execution of writs of inquiry, which, however, the courts agreed to be erroneous, and observed, that the question for their guidance was not whether the plaintiff had recovered interest at the trial to recover interest, and upon this instrument they thought he was. It was the province of the Court only to carry on in aid of the verdict, after the time of the trial, the giving of interest which the jury cannot give for the subsequent time, because it has not then elapsed; but if the plaintiff was entitled to take interest at the trial, though the jury did not actually give it him, the Court would give it now; and as the undertaking made the money payable on a precise day, like a note or a bill, they made the rule absolute.

Interlocutory Judgments. See tit. *Judgment*.

Interrogatories. See tit. *Witness*.

Intrusion. See tit. *Right, Writ of*.

Ireland. See tits. *Affidavit; Affidavit to hold to bail; Arrest; Bankrupt; Costs; Error; Judgment; Venue; Witness*.

1. *CLEMENTS V. WALLER*. H. T. 1768. K. B. 2 Burr. 2154.

Leases by governors of colleges in Ireland must re-
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serve more than a moiety of the true value at the peril of the lessee.

This was upon a writ of error from B. R. in Ireland, where judgment had been given for the plaintiff Waller, lessee of Dr. Baldwin, late provost of the College of Dublin, in an action of covenant, brought there by Mr. Waller, against the executors of Dr. Baldwin; and the plaintiff had taken his judgment against the executors *de bonis propriis*. The facts were, that Dr. Baldwin, the late provost, had made a lease to Mr. Waller, his executors, administrators, and assigns, reserving the rent to Dr. Baldwin and his successors; and Waller had covenanted to pay the rent to Dr. Baldwin and his successors. Dr. Baldwin, on the other hand; had covenanted for himself and his successors, with Waller, his executors, administrators and assigns, to warrant and defend the premises against himself and his successors. The rent reserved was less

than the moiety of the true yearly value of the estate demised by the lease.— Dr. Baldwin died; Dr. Andrews succeeded him as provost, and brought his ejectment against Waller, the lessee, and evicted him; whereupon he brought this action against the executors of Dr. Baldwin, upon Dr. Baldwin's covenant. They cravedoyer of the lease, and pleaded the act of the Irish parliament of 10 & 11 C. 1. c. 3. s. 2. which gives power to governors of colleges, &c. to demise for twenty one years, reserving so much yearly rent or profits, or more at the peril of the lessees, who shall take the same as the moiety of the true value of the said lands, &c. (*communibus annis*), at or immediately before the time of the making such lease shall amount unto. To this plea, the plaintiff Waller demurred; and the Court of King's Bench in Ireland gave judgment for him. Upon which the executors of Dr. Baldwin brought the present writ of error. The question now litigated was; whether the action could be maintained against the executors of the late provost, upon his covenant for himself and his successors, to warrant and defend, &c., in which covenant his executors were not named? The court held the lease void.

2. *Rex v. JOHNSON.* T. T. 1805. K. B. 2 Smith, 591; S. C. 6. East, 583.

This was an indictment against the defendant, one of the Judges in the Court of Common Pleas in Ireland, for a libel which had been published here in England, in Cobbet's Weekly Register, in letters upon the affairs of Ireland, under the signature of Juverna, and which conveyed in strong and nervous language, a very direct censure upon the conduct of the Lord Lieutenant of Ireland, Lord Hardwicke, and the Lord Chancellor, Lord Redesdale, and also upon one Alexander Marsden, Esquire, a secretary of state, and others. The information, which was very long, it is not necessary to set out. It charged that the defendant "unlawfully and maliciously devising and intending to move and incite the liege subjects of our said lord the King, to the hatred and dislike of our said lord, the King's administration of the government of this kingdom, and to insinuate and cause it to be believed that the people of that part of the United Kingdom of Great Britain and Ireland, called Ireland, were oppressed, agrieved, and injured, by our said lord the King's government of the said part of the United Kingdom, and to traduce, defame and vilify the persons employed by our said lord the King in the administration of the government of the said part of the said United Kingdom, and especially the Right Honourable Philip, Earle of Hardwicke, our said lord the King's Lieutenant-General and Governor of the said part of the said United Kingdom, and, the Right Honourable John Lord Redesdale, our said lord the King's Lord Chancellor and Keeper of the Great Seal, and one of his most honourable privy council, of, and for the said part of the said United kingdom, on the 5th day of November, in the forty-fourth year of the reign of our sovereign lord George III., by the grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, at Westminster, in the county of Middlesex, unlawfully and maliciously did compose, write, publish and print, and cause and procure to be composed, written, published and printed, a certain scandalous and malicious libel, in the form of a letter, entitled Affairs of Ireland, containing therein divers scandalous and malicious matters and things, of, and concerning the said part of the said United Kingdom, and the people thereof; and our said lord the King's government thereof; and also of and concerning the said Philip, Earl of Hardwicke, so being such Lieutenant and Governor as aforesaid, and the said Lord John Redesdale, so being such Chancellor and Privy Councillor as aforesaid; and also of and concerning Alexander Marsden, Esquire, then and there being one of the under secretaries, in the office of the chief secretary of the said Philip, Earl of Hardwicke, so being such Lieutenant and Governor aforesaid, that is to say, in one part thereof, according to the tenor, and effect following:" (here followed the libel, which was written with all the keenness and poignancy of a satirist, who either did not know or fearlessly regarded the law). It is unnecessary to state it at length, but the effect of it was as follows: "With more wit than either discretion, or, it must be hoped, truth, the writer compared the administration of Ireland to

To an indictment for a libel in England, the defendant cannot plead there are and were before the Union courts competent in the trial of offences, and that he was born of and commended at the time of publication, for this plea does not show a jurisdiction in any other court.

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the Trojan horse, which though made of wood itself, contained within it a bomb destined to be the means of ruining the country to which it was sent." The conclusion of the indictment was in the ordinary form. Upon this indictment being found, a warrant was issued by Lord Ellenborough, C. J., for the apprehension of the defendant in Ireland under the statute 44 Geo. 3. c. 92. by virtue of which he was taken into custody; and upon an habeas corpus being sued out, his case was argued in Ireland before the baron of the Court of Exchequer, the judges of the King's Bench, the judges of the Common Pleas, and the Lord Chancellor, assisted by the Master of the Rolls, when, after much debate, and with a difference of opinion amongst the judges of each court, this case was deemed within the act. By consent of the Attorney-General of Ireland, he was discharged, upon his undertaking to enter an appearance here on the last day of Easter term, and plead according to the course of the court to the indictment.

[621] Lord Ellenborough C. J., observed, it is objected to the plea that it is insufficient in respect of not showing what court has jurisdiction to try the offence, and that it amounts to an argumentative plea of not guilty. In support of this, the *Doctrina Placitandi*, 234. has been cited, which is a book of great authority upon questions of pleading, and also what has been laid down by Lord Mansfield, in *Cowp.* 170. namely, that in every case of a plea to the jurisdiction of the King's court, you must show a more proper and sufficient forum for the trial of the matter in question, for if there be no other mode of trial, that alone would give the King's court jurisdiction; and in *Kinlock's case*, *Foster's Crown Law*, 10. it is said that the matter of such a plea as this may be given in evidence upon the general issue. By the counsel for the defendant, the necessity of thus putting it on the general issue is denied; and it is argued that it is not necessary in this case to show a particular place of trial in this country, because of the total want of jurisdiction in any court here, and the impossibility of any such court or place of trial existing. But this very admission goes to show that the plea is bad; for if that cannot be done which is required by the general rules of pleading, the consequence is, that the matter relied upon cannot oust the court of its jurisdiction, but is matter to be taken advantage of, either upon a plea in bar, or a plea of not guilty. The record admits the crime to have been committed in Middlesex, and the proposition in effect is this; admitting that the crime was committed in Middlesex, I still insist that I am not punishable by any court of this part of the United Kingdom, though I cannot show that I am amenable to any other. This therefore carries its own refutation with it, upon the authority of Lord Mansfield to; which may be added that of Lord Hardwicke, 1 Vesey, 202. in the case of the Earl of Derby against the Duke of Athol. That was a bill filed for a discovery concerning the general title to the Isle of Man, and to have relief relative to certain rectories and tithes. The defendant pleaded in general to the jurisdiction of the court, that the Isle of Man was an ancient kingdom, not part of the realm, though belonging to the crown of Great Britain, and that no lands, &c. there ought to be tried or examined into here, demanding judgment whether he should be put to answer further. The Ld. Chancellor said: "This comes to be of great consequence to all the courts in England; there are two general questions on this plea; 1st. Whether the plea is good in point of form? not a trifling form; for if the objection thereto on the part of the plaintiff be right, it is material to the nature of such plea.—2dly, Whether good in substance? As to the first it is objected for the plaintiff, that although it is shown in the negative, and alleged that this court has no jurisdiction over the Isle of Man, and that it is not to be tried here, yet it is not shown in the affirmative what other court has jurisdiction, or that there are courts in the Isle of Man, holding plea thereof; and the rule is insisted on that whoever pleads to the jurisdiction of one of the King's Superior courts of general jurisdiction must show what other court has jurisdiction." I am of that opinion, and that for the want thereof, the plea is bad, and ought not to be allowed, if nothing more is in the case, as it is expressly laid down in 2 Hen.

7. 17. a; and *Doctrina Placitandi*, 234. and is agreeable to the general rule of pleas of this sort as in pleas of abatement, wherein it must be shown the plaintiff may have a better writ. The reason of this is, that in seeking for his right, a person is not to be sent every where to look for jurisdiction, but must be told what other court has jurisdiction, or what other writ is proper for him; and this is a matter of which the court where the action is brought is to judge. There are not many authorities on this head, but in the old books of entries the form of pleading is so; and the opinion of Popham, C. J. in *Yelverton*, 13; and *Fitz. Ab. tit. Jurisdiction concerning Wales*; and although *Ld. Vaughan* may have denied that to be the law, he was a very strong *Welchman*, as appears throughout his argument, in which, though there is a great deal of good and useful learning, yet it never was delivered, though intended to be so. It is said to this, that the Court ought, in this case, to take notice of what is the jurisdiction, and the matter of fact is shown; and it is likened to the case of inferior courts, wherein it is sufficient for the defendant to plead that the cause of action arose out of the jurisdiction of that court. But I cannot put this, which is a superior court of general jurisdiction, in whose favour the presumption will be, that nothing shall be intended to be out of its jurisdiction which is not shown and alleged to be so, upon a level with an inferior court of limited local jurisdiction, within whose jurisdiction nothing shall be intended to be which is not alleged to be so; 1 *Saunders*, 74. I was desirous to be informed how the pleas were in this court, which are looser than at law; and no case has been cited in which the plea to the jurisdiction of this court has not given it to another. And afterwards, in speaking of this case, *Ld. Hardwicke* says: "I would not be understood as having overruled the plea on the affirmation of general jurisdiction over the Isle of Man; but the plea was to the jurisdiction, without averring to what court the jurisdiction belongs, and you must always show where the jurisdiction rests." If the circumstances attending the case of the present defendant, namely, that of his birth in Ireland before the Union, and his residence there, as stated in the plea, have the effect of rendering him not answerable for such publication to any forum in England, it must follow from its being no crime; for it rests upon this, that he owed no obedience to the laws of this country; and that owing no such obedience, he ought not to be punished for the breach of them. But such a defence, if it is available in law in any forum, is matter of absolute bar, and the plea ought not to have been in the present form, but it might be taken advantage of upon the general issue. Judgment.—That the defendant should plead over on the morrow, which was afterwards altered to judgment of *respondent ouster instantler*.

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Irregularity. See *tit. Affidavit to hold Bail; Attorney; Bail; Declaration; Execution; Inquiry. Writ of; Judgment; New Trial; Notice; Prisoner; Process; Sheriffs.*

Assuable Pleas. See *tit. Pleas.*

Assuable Terms. See *tit. Terms.*

Issues.

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I. UPON A. DISTRINGAS. See tit. Distringas.

II. FEIGNED. See tit. Feigned Issue.

III. UPON PLEADINGS.

(A) DEFINITION OF.*

(B) DIFFERENT KINDS OF.

(a) *In law*.† (b) *In fact*.‡

(C) OF SEVERAL ISSUES IN ONE CAUSE.§

(D) FORM OF.

1. WILKES V. WOOD. M. T. 1763. K. B. 2 Wils. 203.

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Where proceedings in Common Pleas by bill were made up in Trinity term with out a continuance in the issue from one term to the other, it was holden not irregular, because it might be entered on the roll at any time: This was a proceeding by bill against the defendant, which was of Easter term last; and in Trinity term the defendant pleaded the general issue, whereupon issue was joined that term; the paper-book of the issue had been delivered to the defendant's attorney, whereby the whole proceedings in this cause appear to be of Trinity term, without any continuance from Easter or Trinity; or any *alias prout paret*, which was contended to be irregular, this being a proceeding by bill of Easter term; and therefore it was now moved that the issue, as delivered, may be set aside for this irregularity. On showing cause, *Per Cur.* This is a nice objection; it is a mere matter of form; and we think the continuance, or *alias prout paret*, are not necessary in the issue-paper; it may be entered at any time upon the Rolls.—Rule discharged.

* An issue is defined to be a single, certain, and material point, arising out of the allegations or pleadings of the plaintiff and defendant, Co. Lit. 126. a.; but it more commonly signifies the entry of the allegations or pleadings themselves.

† An issue in law arises out of a demurrer; see Tidd, 773. 8th Edit.

‡ An issue, in fact, is one triable by jury, either upon *nisi tunc record*, or upon pleadings concluding to the country.

§ Two or more issues are sometimes joined in the same cause; as where the defendant demurs and pleads to different counts of a declaration, or the plaintiff demurs and replies to different pleas; or where, in an action against two or more defendants, they appear by different attorneys, and sever in pleading; Chitty, Pl. vol. 1. p. 629, &c. In these cases there is only one trial of the issues in fact; and the jury who try them assess the damages for the whole cause of action, or against all the defendants, absolutely, if the other issues have already been determined in favour of the plaintiff, or otherwise conditionally, provided judgment shall be afterwards given for him.

|| In the issue there should be an entry of the declaration and subsequent pleadings proffered in the K. B., with a memorandum, stating the exhibiting of the bill, and that there are pledges for the prosecution of it. The reason for a memorandum is, that proceedings by bill were formerly considered as the bye business of the court; Gilb. C. P. 47. And it varies in four cases: 1st. When the issue is of the same term in which the cause of action accrued. 2ndly. When it is of a term subsequent to the cause of action, but of the same term with the declaration. 3rdly. When it is of a term subsequent to the declaration, and within four terms after. 4thly. When it is more than four terms after the declaration. In the first case, the memorandum is special, stating the bill to have been exhibited on a particular day in term, after the cause of action accrued. In the second case, it states the bill to have been exhibited on the first day of the term in which the declaration was delivered. In the third and fourth cases, it pursues the fact, but with this difference, that in the third case, the term of exhibiting the bill is referred to as last past, and in the fourth, as in a certain year of his King's reign; 1 Saund. 40. (1.); 2 Saund. 1. (1.) If the plea be of a term subsequent to the declaration, the issue by bill, in the King's Bench contains the entry of an imparlance, which we have seen, ante tit. Imparlance, is general or special. When a special imparlance is necessary, to enable the defendant to plead any particular plea, it must be entered in the issue; but, otherwise, the entry of a general imparlance is sufficient; and it is not necessary to enter more than one imparlance, though several terms have intervened between the declaration and the plea. When the replication is of a term subsequent to the plea, it is usual for the clerk of the papers to insert continuances in the paper-book; but this does not seem to be necessary: 1 Co. 75. There is no imparlance roll in the King's Bench. But in the Common Pleas, when an original is actually issued in the first instance (which however is seldom the case), or the proceedings are by bill filed against an attorney or member of the House of Commons; if the defendant be entitled to an imparlance, it is entered on a roll

2. **MORRIS v. PUGH.** T. T. 1762. K. B. 1 Blac. 312; S. C. 3 Burr. 1241. [625]

Trover for a mare, which Pugh hired of the plaintiff, and sold to Harwood, the other defendant, on the 31st of March. The declaration was of Easter term which began the 8th of April; and no evidence was given of a demand from the plaintiff to Harwood till the 9th of April whereupon the counsel for the defendant insisted on a nonsuit, there being no conversion till demand and refusal, as the mare still continued in the possession of the defendant. The plaintiff then proved that the writ was not sued out nor served till the 2nd of May, long after the demand and refusal.

Lord Mansfield at first inclined, that the detention before action brought, coupled with the demand and refusal after, amounted to a conversion *ab initio*. However, a verdict was taken for the plaintiff, subject to the opinion of B. R., whether the verdict should not in respect of costs be entered, as if it had been found for the defendant, the mare being agreed to be delivered immediately. The Court agreed if the plaintiff had declared on a special day in the term, or had entered a memorandum on the roll that the action was brought on such a day in the term, it would have cured this defect.

3. **GUY v. KITCHENER.** T. T. 1780. K. B. 2 Stra. 1271; S. C. 1 Wils. 171.

Assault and battery. The defendant pleaded *son assault demesne*. Tried before Justice Foster. The defendant failed in proving his plea; then the plaintiff went on in his evidence, and proved an assault, made on the 27th of October, and the memorandum in the record is of the first day of Michaelmas term, being the 23rd of October; but the day of the assault laid in the declaration is the 19th of the same October. It was insisted at the trial, that the plaintiff ought to be nonsuited, as not having proved any assault before the commencement of the suit; but the judge refused to call the plaintiff, and there was a verdict for the plaintiff, subject to the opinion of the Court.

called the imparlance roll, which is made up of the term the original writ is returnable or bill filed; and contains an entry of the declaration or bill, and of the defendant's appearance thereto, with the prayer or grant of an imparlance. After the declaration or imparlance, if there be one, the pleadings are next copied, in their proper order, beginning each with a new line; and under them the clerk of the papers is directed to write the names of the counsel by whom they are signed, as well on the part of the plaintiff as of the defendant; R. E. 18 and the Car. 2. K. B. Formerly if there had been a plea in abatement, upon which a respondent ouster was awarded, and afterwards the defendant had pleaded in chief, it was necessary to enter the plea in abatement and judgment of respondent ouster, in making up the issue, as well as the plea in chief; 1 Salk. 5; and where they were entered in the plea roll, but omitted in the record of Nisi Prius, the Court on that ground arrested the judgment, the record of Nisi Prius not appearing to be in the same cause; 1 Ld. Raym. 329; Carth. 447; 5 Mod. 399; 12 Mod. 189. S. C. Afterwards a rule was made in the King's Bench, that for the future, a copy of the plea in chief only should be delivered and paid for; 7 Mod. 51; 1 Salk. 5; and agreeably thereto, where the plea in abatement and judgment of respondent ouster were omitted in the plea roll, the Court held the omission to be immaterial, particularly as the defendant had accepted and paid for the issue; 3 Burr. 162. In the Common Pleas the issue is entitled of the term in which it is joined; Imp. C. P. 358; and made up in the same manner as in the King's Bench, by original. In the Exchequer, the issue begins with the placita, or style of the Court, of the term it is joined; and when the issue is of the same term with the declaration, it merely contains a transcript of the pleadings, after the placita, beginning each with a new line, without any memorandum or imparlance; but when the issue is of a subsequent term, a memorandum is prefixed to the declaration, and the entry of an imparlance to the plea.

* After verdict, where there has been a general memorandum, by which the cause of action appears to have arisen after the action brought, it has been allowed to be rectified, by an examination of the real time of filing the bill, or of the bail, to which the bill relates; but the better and more usual way is, to file a new bill, and amend by it; 1 Stra. 583; 2 Id. 1151, 1162; 1 Wils. 104; 6 Durn. & East, 129; and this may be done, even in a *qui tam* action. In a modern case, 7 Durn. & East, 474; 1 East, 655. the Court gave the plaintiff leave to amend the bill filed, by inserting a special memorandum of the day of filing the same, and to carry in a new roll agreeable to the amended bill, and to make the transcript conformable to the new roll, even after a writ of error brought, on payment of costs. But such an amendment cannot be made, after proceedings are entered on record, without leave of the Court. And after obtaining the paper book from the clerk of the papers, with a memorandum of the term generally corresponding with the declaration, neither party has a right to amend it by making a special memorandum of the day of the delivery of the declaration, without an order for leave to amend; see 1 Chit. 366; 1 M. S. 292; 1 Chit. Rep. 45; 2 B. & A. 172; 1 Chit. Rep. 277,

plaintiff need not give any evidence on this plea, unless in aggravation.

Per Cur. The defendant by his plea admits an assault, which is laid before the day of the memorandum; and the plaintiff's proving an assault was unnecessary. If this had been upon the general issue, the Court would have let the plaintiff have mended his bill by making a special memorandum; and this has been done where the day laid in the declaration was after the memorandum, in *Bennett v. Mainwaring*; 7 and 8 Geo. 2. The *poslea* was delivered to the plaintiff.

(E) CONCLUSION OF THE ISSUE AND AWARD OF VENIRE.*

(F) BY WHOM, WHEN, AND HOW MADE UP.

1. *WOOD V. MILLER*. M. T. 1802. K. B. 3 East, 204.

In actions by bill in K. B., the issues should be made up of the term term preceding; in which it is joined. †

The proceedings were by bill. The declaration was of Hilary term. Plea, *non assumpsit* of the same term. A rule to reply was given in Easter term, when the plaintiff replied the *similiter*; and in Trinity term following, on a rule to enter the issue, it was entered by the plaintiff, entitling it of Hilary of the term term preceding; after which the defendant signed judgment on *non pro*, for not entering the issue. The Court, after consulting the master, held, that the

* The conclusion of the issue is the award of venire, the form of which depends upon the number of issues to be tried; see *Tidd*, 778. 8th Edit. In an action of debt on bond, conditioned for the performance of covenants, when breaches are assigned in the declaration or replication, or suggested after an issue of *non est factum*, &c., on the stat. 8 & 9 W. 3. c. 11. s. 8. the venire should be awarded specially to try the issue; and in case it be found for the plaintiff, to inquire of the truth of the breaches, and assess the damages sustained thereby. So where the defendant in trespass pleads to part of the declaration, and lets judgment go by default as to the residue, or pleads to the declaration, and lets judgment go by default as to new assignment, there is a special award of the venire, as well to try the issue, as to assess the damages on occasion of the residue of the trespasses, or of the trespasses newly assigned. And if there are several defendants, some of whom plead, and others let judgment go by default, the venire is awarded, as well to try the issues, as to assess the damages against the latter defendants; 2 B. & P. 168. In these cases, as it is a rule that the jury who try the issues shall assess the whole of the damages, 11 Co. 54. there is an entry of an *unica taxatio*. If there be several issues, in fact and in law, one triable by the country, and another by the Court on *nisi tunc* record, the award of the venire is, as well to try the former, as to assess the damages upon the latter; absolutely, if the issues in law, or of fact, triable by the Court, have been already determined in favour of the plaintiff, or otherwise conditionally, in which case judgment shall be thereupon given for him; 1 Saund. 109. (1); 2 Saund. 300. (8); *Id.* a (4). In these cases, if the issues in law or of fact, triable by the Court, are first determined, and the plaintiff is in consequence entitled to damages upon part of the declaration, or against one of several defendants, there is an entry of an *unica taxatio*, to postpone the assessment of such damages, until the trial of the issues in fact. But if the issues in fact are first tried, an *unica taxatio* is unnecessary; for in such case, the jury who try those issues will of course assess the damages. Where the sheriff is a party, or interested in the cause, the venire is awarded to the coroner; 2 Lill. P. R. 124; or if there be two sheriffs, and one of them is interested, to the other; 3 M. & S. 144; and if the coroner, as well as the sheriff, be interested, the venire is awarded to two persons, appointed by the master or prothonotaries, called *elisors*; 3 East. 141; *Barnes*, 465. When the venire is laid in a county palatine, instead of the common award of a *venire facias*, there is a special award of a *mittimus* to the justices there, commanding them to issue the jury process, and when the cause is tried to send the record back again to the Court above. At what time the practice originated, of sending records by *mittimus* into counties palatine, is not quite clear; but so late as the 11 W. 3. the Court expressly said, they could not order a trial in the county palatine of Lancaster, and therefore they sent the record to be tried in Yorkshire, as being the next county; 13 Mod. 313; *Say. Rep.* 47; 1 D. & E. 368; *Manning, Exch.* 296. (x); *Imp. C. P.* 252. c. 23. s. 5. When the action is laid in a place where the King's writ of venire does not run, as in Wales, or Berwick-upon-Tweed, 2 855; 2 Blac. 1036; the venire is awarded to the sheriff of the next English county, upon a suggestion that the issue ought to be tried there. In *Sir Peter Delme's case*, 10 Mod. 198. it was settled, and has ever since been the practice of the Court, that if either party would suggest any special matter about awarding the venire out of the common course, he should give a copy of it to the adverse party, and allow him a reasonable time to consider it, before a *nient dedire* is entered; 1 Stra. 255. 183. And when there are several plaintiffs or defendants in a personal action, and one of them dies before issue joined, his death should be suggested, in making up the issue; but otherwise it need not be suggested, till the judgment roll is made up; 1 Curr. 363; *Barnes*, 469.

† The issue, as dependant on the pleadings, is general or special. In the King's Bench, in every action wherein the defendant pleads the general issue, or demurs generally to the

issue ought to have been entered as of Easter term, and not of Hilary term; and, therefore that the judgment of *non pros* was regular.—Rule discharged.

2. *Boon v. Erax*. T. T. 1769. C. P. 1 H. Bl 254

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The plaintiff's attorney in this case added the *similiter* to the end of his replication, and delivered the issue, with notice of trial, to the defendant's attorney, who received it, but did not pay the issue money; in consequence of which the plaintiff's attorney signed judgment, without giving a rule to rejoin. And the rule was obtained to show cause why the judgment and all the subsequent proceedings, should not be set aside for irregularity, on the ground that a rule to rejoin ought to have been given. The Court, after consulting the prothonotary, who said that the practice was not to give a rule to rejoin where the defendant had received the issue, with the *similiter* added by the plaintiff, and not struck it out discharged the rule with costs.

And where the issue money was not paid, and the plaintiff signed judgment with out a rule to rejoin, the Court held the judgment regular.

(G) OF THE PAPER-BOOK AND ISSUE.*

declaration, on a plea of *plene administravit*, by an executor or administrator in debt when the defendant pleads a special *non est factum*, *compersuit ad diem* to a bail bond, or *qui tunc* record to an action on a judgment or recognizance; in covenant, when his plea concludes to the country; and in trespass, when he pleads *son assault demesne liberum tenementum*: or not guilty to a new assignment, the issue is made up on four-penny stamped paper, 55 Geo. 3. c. 184 Sched Part. 2. s. 8. by the attorney; who likewise make up all issues and demurrers upon writs of *error scire facias audita querela*, and repleaders, or other matters, formerly entered of record; R. T. 12 W. 8; K. B. In all other cases both by bill and original in the King's Bench, the issue, or, as it is commonly termed, the paper-book, or upon an issue in law, the demurrer-book is made up by the clerk of the papers, 55 Geo. 3. c. 184; who charges the plaintiff's attorney 8d. per folio for the whole book, and 4d. per folio for all the pleadings subsequent to the declaration (which the plaintiff's attorney furnishes him with a copy of), besides stamps. In the Common Pleas, the issue is in all cases made up, on four-penny stamp, paper, 55 Geo. 3. c. 184. by the plaintiff's attorney, or in country cases by his agent. Formerly, when the plaintiff in his replication concluded to the country, or demurred, the issue in the King's Bench could not have been made up, till a four day rule had been given and expired, to rejoin or join in demurrer; but the practice in this respect is now altered, it being a rule in that Court, that in all special pleadings, when the plaintiff takes issue upon the defendant's pleading, or traverses the same, or demurs, so as the defendant is not let in to allege any new matter, the plaintiff may make up the paper-book, without giving a rule to rejoin; R. T. Geo. 2. K. B. 6 East, 886; but otherwise a rule must be given for that purpose, unless the defendant be bound by a judge's order, to rejoin gratis. If the plaintiff will not make up the paper-book, it may be made up by the defendant; and a rule may, it seems, be given thereon by the master for the plaintiff to enter the issue of record; or, in default thereof, that it may be entered by the defendant; R. E. 11 W. 3. K. B. But the more usual way is for the defendant to rule the plaintiff to enter the issue; and on his neglecting so to do, to sign a judgment of *non pros*. In the Common Pleas, when the defendant's plea concludes to the country the plaintiff may add the *similiter* forthwith, and make up and deliver the issue, with notice of trial; but when the plaintiff's replication concludes to the country, he cannot regularly make up the issue, without previously giving a four day rule to rejoin, unless the defendant be under terms of rejoining gratis. It is not unusual, however, for the plaintiff's attorney, in such case, to make up the issue forthwith, and deliver it with notice of trial. In actions by original in the King's Bench, the clerk of the papers makes up the issue, or paper book of the same term with the declaration; Imp. K. B. 3 Ed. 621; or it may be entitled of the term issue joined, as in actions by bill, Id. 363; and it begins with a copy of the declaration, without a memorandum. And it is not necessary to enter imparlances, if the pleadings are of a subsequent term. This, however, is sometimes done; and imparlances are commonly entered by the clerk of the papers between the plea and replication.

In the King's Bench, the general issue or paper-book being made up, is delivered to the defendant's attorney or agent; and if there are several defendants, who appear by different attorneys a copy should be delivered to each of them. In the margin of the paper book a [conditional] rule is given by the clerk of the papers, signifying that unless the defendant receive the paper-book, and return it by a particular day, to be enrolled, a writ of inquiry will issue, or rule for judgment be entered. If a paper-book be made up and delivered in term time, or within four days exclusive after term, with a rule given thereon; by the clerk of the papers, for bringing the same to be enrolled, and the defendant's attorney do not, within four days after the delivery thereof, bring it back and join with the plaintiff in the special issue or demurrer, or waive his special plea, and give the general issue, or demurrer to any special issue tendered, judgment may be entered and signed as if no plea had been pleaded. And the clerk of the papers has no discretion to give a rule to return the paper-book in less than four days, even though the defendant be under terms to

1. HASELAR v. ANSELL T. T. 1779. K. B. Doug. 197.

If the paper book be not returned in time, the plaintiff may sign judgment and refuse to accept it. { 629 } If returned in time, it is usually done in the same state as delivered; but if defendant has not been ruled to abide by his plea, he may waive the special pleading, and give the general issue.*

Action on a bond. Plea, judgment recovered. Replication, *nul tiel record*, which was delivered with a rule to return the paper-book in four days. The paper book was not offered to be returned till the morning of the fifth day, before the opening of the office, when the plaintiff refused to receive it, and immediately entered up judgment and took out execution. Upon this the defendant obtained a rule to show cause why the judgment and subsequent proceedings should not be set aside for irregularity. In support of the rule, the case of *Oxley v. Bridge* was relied on as directly in point to show that, by an equitable extension of the four days, they are supposed to continue till the office open on the morning of the fifth. Lord Mansfield was inclined to believe, that *Oxley v. Bridge* differed in circumstances from this case, and was clear, that a judgment entered up agreeable to what the master had certified to be, in strictness, the practice of the Court, could not be set aside for irregularity.

2. ANON. M. T. 1688. K. B. 2 Salk. 515.

Before joinder in demurrer the defendant may waive his special plea, and plead the general issue. *Per Cur.* But if there be a rule to plead, so as to stand by it, and the defendant pleads a special plea, as he may, and the plaintiff demurs, the defendant shall not then waive and plead the general issue.

3. MOUNTSTEPHEN v. TEMPLER. T. T. 1734. Ca. Prac. 94; S. C. Barnes, 251.

A motion to set aside a judgment which had been signed for want of paying for the issue. It appeared that the issue was tendered in the country, and not in the C. P. to the agent in town. The Court declared those things should not be transacted in the country, but by the agents in town.

4. JONES v. BRYANT. M. T. 1793. K. B. 5 T. R. 400.

A rule on a former day called on the plaintiff to show cause why the interlocutory judgment, which has been signed for not paying the issue money, should not be set aside, on the ground that the plaintiff has waived his right of signing judgment of this account, by having given notice of trial (which was afterwards countermanded) after the issue money was demanded.

Buller, J. The plaintiff cannot sign judgment without demanding the issue money; but, by delivering notice of trial, he does not waive his right to receive it. In this case, there was a demand of the issue money, and therefore the judgment is not irregular. *Per Cur.* Rule discharged.

the defendant was obliged to pay for the same, except in actions by paupers;

5. ANON. H. T. 1753. K. B. Sayer, 77.

Or against an attorney; Upon a rule to show cause, why the judgment signed should not be set aside for irregularity, it appeared that the judgment was signed because the plaintiff, who was an attorney, refused to pay for the plea. The rule was made absolute. And by the Court: An attorney is not obliged to pay for the plea in a cause wherein he is himself plaintiff.

take short notice of trial; *Hale v. Smallwood*, E. 35. G. 3. K. B. But when a plea is not put in in time, so that a paper-book may be made up and delivered in term, or within eight days after the term, the defendant's attorney is obliged to receive it and return it, again in four days after the delivery, or judgment may be signed; R. T. 1 Geo. 2. K. B. If a plea be pleaded in term, or in time after the term, and the paper-book be not made up and delivered within eight days exclusive after term, if it be an issue to be tried in London or Middlesex, or a demurrer, the other party is not bound to deliver back the book till within the first four days of the next term; but if it be an issue to be tried at the assizes, the defendant's attorney should deliver back the book within four days exclusive. Imp. K. B. 352; R. T. 1 Geo. 2. after the delivery thereof, and join in the special issue, or give the general issue, and take notice of trial, or else the plaintiff's attorney may sign judgment by default as if the defendant had not pleaded; R. T. 1 Geo. 2. K. B.

* Or, if the *similiter* to the replication has been added by the plaintiff, he may strike it out and demur. In the latter case, the plaintiff having joined in demurrer, a demurrer book is made up by the clerk of the papers, and delivered over to the defendant's attorney, who must return it in twenty-four hours, unless the demurrer be special, and the defendant has not been ruled to abide by his plea, in which case he may still waive his special plea and demurrer, and give the general issue. If the paper book be returned with the general issue, the plaintiff's attorney makes up and delivers the issue fresh, in the common form.

6. EVERALL v. MASON. H. T. 1754. K. B. Ca. Prac. 35; S. O. 2 Wils. 11.

Debt upon a judgment; the defendant appeared by attorney and pleaded *Or prison nul tiel record*, and issue thereupon, *quod habetur tale recordum*; the plaintiff signed judgment for non-payment for the issue, and now it was moved to set it aside, for that a prisoner is not obliged to pay for the issue book; but by all the secondaries then in court, it was reported that the practice is, where a prisoner appears by an attorney he shall pay for the issue, or judgment may be signed; otherwise it is where he appears in person.

Per Cur. If this had been an issue to the country we would have set aside the judgment upon paying the costs of the motion, and for the issue, for we will not let final judgment go where the merits have not been tried, and where the plaintiff cannot suffer any inconvenience by any affected delay; and here he has the defendant's body in prison; but as this is debt upon a judgment, there is no doubt but there is such a judgment; so there is nothing of merit to be tried, and the judgment must stand.

7. LAWSON v. HUMBLETON. E. T. 1727. C. P. Ca. Prac. 35. Barnes, 239. And on default plaintiff was en-
titled to sign judgment.

The Court held, that in all cases, the plaintiff's attorney may sign judgment for refusing to pay for the copy of an issue, or demurrer book, except where titled to the defendant is a prisoner, and in that case he is restrained from signing it on-ly where no attorney appears to be concerned for the prisoner.

8. NEGGERs v. —. H. T. 1793. K. B. 5 T. R. 218. But now a different rule obtains;

It is ordered that after the first day of the next term no judgment shall be signed for non-payment of issue money, but that the issue money shall remain to be taxed, as part of the costs in the cause.

9. FULLER v. OSBORNE. M. T. 1795. K. B. 6 T. R. 477. [631]

To an action of *assumpsit*, the defendant pleaded the general issue, as to all except 2l. 8s. 9d., and a tender as to that. The plaintiff delivered the paper-book with notice of trial for the last Hertford assizes, and the defendant returned it on the 6th of July, within the time limited. On the 10th of July the plaintiff signed judgment, because the defendant had not paid his share of the paper-book when he returned it. Lord Kenyon, C. J., said: We have had a conference with the judges of the Court of Common Pleas, and they all agree with us in thinking that the rule lately established was, and which has been since adopted in that court, ought to be general. Therefore, this rule must be made absolute. As applicable to the general issues as well as special pleas.

10. SHEPLEY v. MARSH. E. T. 1739. C. P. 2 Stra. 1131. Sayer, 154.

The plaintiff declared on a bond, dated 6th January, 1728. The defendant pleaded *non est factum*, and in the issue delivered the bond was described as in 1738, and the issue was received and paid for without any objection; the record of Nisi Prius stated the date 1728, and no defence being made, the Court was now moved to set it aside, as varying from the issue delivered. But the Court refused to set aside the verdict, for the defendant's plea upon record was not altered by it, the issue tried being, whether he executed a bond in 1728. Besides, he should have refused the issue, if not agreeable to the declaration. The acceptance of the issue or return of the paper book admits it was proper ly made up.

11. MATHER v. BRINKER. E. T. 1764. K. B. 2 Wils. 243.

It was moved on the behalf of the defendant to set aside a verdict for the plaintiff, without defence at the trial, because the paper-book of the issue delivered and paid for varied from the record of Nisi Prius in this, viz. in the issue delivered, in the beginning of the declaration, the plaintiff's name was James, but in the record of Nisi Prius it was John, which was the plaintiff's right name; and in the issue delivered, in that part where the breach is assigned, it was "not regarding his promises," &c. but in the record of Nisi Prius, it was "regarding his promises," &c., the word *not* being omitted. If it be objectionable a summons must be taken out to set it right, as no advantage can be taken at the trial.

Per Cur. This is a *vitium clerici*, and could not possibly prejudice the defendant at the trial, and the case in 2 Stra. 1131. is a stronger case. So the rule to show cause why the verdict should not be set aside was discharged; for there ought to have been a summons to set it right.

(H) ENTERING OF.

1. LANCASTER V. FRASER. E. T. 1813. K. B. 1 M. & S. 478.

Before judgment for [632] Motion to set aside judgment of *non pros* for not entering the issue. The rule to enter the issue was in Michaelmas term; the issue was not entered in time, and thereupon judgment of *non pros*. The question was, whether there must not be a rule to enter the issue of the terms in which judgment was signed. It was admitted that, with respect to a rule to plead, the practice was so; and the Court, upon reference to the master, said it was the same in this case.

2. MINNS V. BAXTER. M. T. 1785. K. B. 1 T. R. 16.

Against a rule which had been obtained to show cause why the judgment of *non pros*, which had been signed in this cause, should not be set aside for irregularity. The irregularity consisted in this; the plaintiff had a four day rule to bring in the issue roll; which expired the 14th of June last; the defendant on that day searched in the office, and the roll not being then brought in signed judgment of *non pros*. the next day at twelve. This practice the counsel contended was regular. The Court was of that opinion; and it appearing that the plaintiff's attorney had told the defendant's attorney of the irregularity, and had desired the matter might be rectified, without its being brought before the Court, but that he had refused; the Court made the rule absolute.

3. WAIR V. SMITH. H. T. 1733. K. B. 1 Stra. 414.

The plaintiff's attorney sent the issue book to the defendants, who accepted it and paid for it; the plaintiff's attorney, in order to carry down the cause by proviso, made an affidavit that he had mislaid the papers: the Court ordered the defendant's attorney to give him a copy of the issue, the better to enable him to comply with the rule.

4. MARGERUM V. FENTON. T. T. 1756. C. P. Barnes, 318.

Non pros, signed for want of plaintiff's entering issue, set aside as irregularly signed one day, before the time limited by rule for entering the issue expired. The rule runs "unless plaintiff, within four days next after notice, shall cause the issue to be entered," which excludes the day of notice. The rule was served on Friday the 22nd of June, and the issue roll brought in on Tuesday following, on which day the *non pros* was signed.

(I) OF IMMATERIAL ISSUES.†

(J) OF AMENDMENTS IN. See tit. Amendment, Vol. i. p. 533.

* After the issue joined, the plaintiff should enter it on record, and proceed to argument, if an issue in law, or to trial, if an issue in fact; and if he neglect to do so, the defendant, in the King's Bench, may compel him, by obtaining a rule from the master on the back of the issue, if delivered, entering it with the clerk of the rules, and serving a copy on the plaintiff's attorney. In the Common Pleas, the defendant's attorney should get a side bar or treasury rule from the secondaries, for the plaintiff's attorney to enter the issue on record, within four days after notice given, and serve him with a copy thereof. But the defendant cannot give a rule to reply, and enter the issue in the same term. And in the King's Bench, if the action be laid in London or Middlesex, the defendant ought not to give a rule for the plaintiff to enter his issue the same term it is joined, unless notice of trial has been given; R. M. 4 Anne, K. B. In the Common Pleas, whether the action be laid in London or Middlesex, or in the country, the defendant can in no case give a rule to enter the issue the same term it is joined, but must stay till the next term, Imp. C. P. 363; and in a country cause, the plaintiff is no ways bound to enter his issue the same term; R. M. 4 Anne, K. B.; R. M. 1654. P. C. In the Exchequer, it is said a defendant may give a rule for the plaintiff to enter his issue the same term in which it is joined, whether notice of trial has been given or not; Man. Ex. Pr. 320. The plaintiff being ruled to enter the issue in the King's Bench, must enter it, if in London or Middlesex, and bring the record into the office within four days after notice of the rule; if in the country before the continuance day of that term; otherwise a *non pros* may be signed, and the defendant shall have his costs; 2 Lill. P. R. 87.; R. M. 4 Anne, K. B. And where one of two defendants in trespass, after having pleaded, separately signed a *non pros* for not entering the issue, the Court held the judgment to be regular.

† A verdict cannot help an immaterial issue; but an informal one is aided by the 32 Hen. 8. c. 30; Gibb. C. P. 147. An immaterial issue is, when that which is materially alleged by the pleadings, is not traversed; but an issue taken on such a point as will not determine the merits of the cause. An informal issue is, where such allegation is not traversed in a proper manner; Cro. Eliz. 227; Carth. 371; 1 Lev. 32; 2 Mod. 187; when the issue is immaterial, the Courts will award a replender.

(K) MISJOINDER OF ISSUES. See tit. Judgment.

Matra. See tits. *Bills and Notes; Judgment.*

Notfalls. See tits. *Judgment; Pleading.*

Jems. See tit. *Religion, Offences against.*

Joinder. See tits. *Indictment; Misjoinder.*

Joint Insurance. See tit. *Insurance.*

Joint Stock Companies. See tit. *Public Companies.*

Joint-Tenants. See tits. *Tenants, joint.*

Judge. See tits. *Bankrupt; Ecclesiastical Courts.*

1. *MOSTYN v. FABRIGAS.* M. T. 1774. K. B. Cowp. 172.

Per Cur. By the law of England if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as a judge of record, and that will be a complete justification. So, if he be the injury complained of had been done by the defendant as a judge, though it arose in a foreign country, where the technical distinction of a court of record does not exist, yet, sitting as a judge in a court of justice, subject to a superior review, he would be within the reason of the rule which the law of England says shall be a justification; but then it must be pleaded.

2. *MILWARD v. THATCHER.* M. T. 1787. K. B. 2 T. R. 87.

Per Cur. The cases cited from Cro. Car., Cro. Eliz., and Sir W. Jones, are cases of writs of error brought in civil actions, and the objection was taken to the competency of the judges below; but in such cases, the question whether they be properly judges or not can never be determined; it is sufficient they be judges *de facto*.

Judge's Order. See tits. *Affidavit to hold to Bail; Pleadings; Judgments; Insurance; Particulars of Demands; Inspection; Venue; Consolidation of Actions; Payment of Money into Court.*

1. *NEGGERS.* M. T. 1821. K. B. 5 B. & A. 217.

It is ordered, that the rule of court made in Michaelmas term, in 11 Geo. 1. which directs that no summons shall be attended, nor any matters transacted before any judge at chambers or elsewhere, during the sitting of this court at Westminster, be discharged.

2. *WRIGHT v. CLERK.* M. T. 1814. C. P. 5 Taunt. 306.

This was an action for non-residence on four benefices. The plaintiff had on application intended to consent to discontinue as to the vicarage of Great Wilbraham, and to admit a notification of exemption as to the benefice of Abbathon; but, by a mistake, his attorney, in the hurry of business, had given a consent to discontinue as to both. He had applied to a judge by summons to have the error rectified, and the application being refused, he had obtained

* And C. P.; M. T. 8 Geo. 4; and also by the 1 Geo. 4. c. 55. s. 5. The judges of the courts of King's Bench and Common Pleas, and barons of the Exchequer at Westminster, and the justices of Chester, are authorized, during their respective circuits for taking the assizes, to grant such and the like summonses, and make such and the like orders, in all actions and prosecutions depending in any of his Majesty's courts of record at Westminster, in which the issue brought to trial would be to be tried upon such their respective circuits, as if such justices of the courts of King's Bench, &c. were respectively judges of the courts in which such actions or prosecutions are depending, although such respective justices of the courts of King's Bench, &c. may not be judges of the court in which such actions or prosecutions are depending; and, for the purposes of this act, the counties palatine of Lancaster, Durham, and Chester, shall be taken to be counties on the circuits of the respective justices of the courts of King's Bench, &c.

† In some cases a judge's order is drawn up in default of appearance on the first summons, as for a *superseated* to discharge a prisoner on the ground, that the plaintiff had not declared in time; but in general there must be three summonses before the judge will make an order for non-attendance. And in vacation, when the court is not sitting, some things are allowed to be done by a judge at chambers, which in term time must be moved in

If an action be brought against a judge as such, he may plead that what

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he did was in that capacity, even though he be the judge of a court in a foreign country and the dominion of the crown.

And if he be a judge *de facto* on his judgment, whether in a criminal or civil proceeding, cannot be impugned. Formerly, in term time, no order could be granted by a judge

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at chambers; but now a different rule obtains in K. B. &c. Previously, however, to an order, there is in general a summons. f. If the or

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be made to
the court.

a summons from another judge who was not apprised of the former attempt, and who likewise, upon a hearing, refused to interfere; whereupon it was now moved the Court that the rule be rescinded as to Abbathon, on admitting the notification disputing the title. The Court strongly reprobated the practice of making an application to one judge at chambers which had already been refused by another judge at chambers; if parties were dissatisfied with the order of a single judge they ought immediately to apply to the Court. This impropriety would not, however, prevent the Court from now granting the rule, if it were fit to be granted: but in a penal action, where the parties had compromised it by mutual consent, they must abide by their own act; the Court was unanimous that it ought not to be again opened.

3. JAMES V. KIRK H. T. 1819 K. B. 1 Chit. Rep. 246.

If the or-
der be ob-
tained, it
may be re-
lived either
by moving
the Court
to set it
aside;

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Action for slander, alleged to be spoken by the defendant of the plaintiff, touching certain transactions between the plaintiff and one Edward Rawlins. The defendant pleaded the general issue, and notice was given for trial at the next assizes for the county of Kent; but a short time previous to the assizes the plaintiff's attorney discovered that, owing to a defect in the original instructions, the nature of the transactions between the plaintiff and Edward Rawlins was erroneously alleged in the declaration, and that, therefore, he could not proceed to trial without the declaration being amended; and there not being sufficient time to obtain an order for that purpose, the judges being then on circuit, he countermanded the notice of trial. Shortly before the last term the plaintiff's attorney laid the declaration, with farther instructions, before counsel, in order that it might be amended; but he was not able to obtain the declaration as amended until lately. An application was then made to Mr. Justice Best, for leave to amend the declaration and issue delivered; and his lordship made an order for that purpose, on payment of costs, to be taxed by the master, allowing the defendant also to imparl until next term. The alterations and amendments in the declaration related to the nature of the dealings and transactions between the plaintiff and Edward Rawlins, and the application of the slanderous words to those dealings; but the slanderous words alleged were the same in both declarations. On a former day a rule was obtained, calling on the defendant to show cause why so much of the order of Mr. Justice Best abovementioned as related to the imparlance until next term, should not be rescinded. Abbott, C. J. This is an application by the plaintiff, to set aside part of an order obtained by himself. He was the person applying to the learned judge for the order to amend his declarations on the terms imposed of giving defendant an imparlance until the next term as the price of the indulgence. He need not have taken an order at all, but he thought fit to take it himself. The circumstances of a judge having made an order at chambers is certainly no reason why the same question should not be reconsidered by the Court. It might happen to be extremely fit that an order made by a judge at chambers should be rescinded or wholly discharged. But in order to do that, it is incumbent on the party to suggest to the Court sufficient grounds to induce them to do so. In the present case, no sufficient ground appears to me to be suggested for altering the order of my brother Best; and therefore this rule must be discharged, with costs.—Rule discharged, with costs.

court,—to enter up a judgment on a warrant of attorney, above one and under ten years old, or to refer it to the master or prothonotary, to compute principal and interest on bills of exchange or promissory notes, &c. In the former case the order is granted in the first instance; but in the latter it is preceded by a summons. A judge at chambers will not set aside an execution or other act of the Court; but where the justice of the case requires it, he will stay the proceedings thereon in vacation, to give the party an opportunity of applying to the court in the ensuing term. The summons issued by a judge of any of the courts of law at Westminster is subject to the duty of 1s., and the order made or given by a judge of any of the said courts, and the copy of every such order, to the duty of 2s. 6d. by the general stamp acts, except such orders and summonses as shall be made on the application of any prisoner or insolvent debtor, and except all summonses and orders for the delivery of the particulars of a plaintiff's demand, or for staying proceedings on payment of debt and cost, and all summonses and orders for time to plead, reply, or rejoin, after the first order for that purpose.

4. *REX V. WILKES*. H. T. 1770. K. B. 4 Burr. 2570

Per Cur. The business done at chambers is the most irksome part of the office of a judge; but it is greatly for the benefit of the subject, and tends to the advancement and expedition of justice. It arises from the overflowing of the business of the Court, which cannot be all transacted in court; the order of a judge is subject to an appeal to the Court, but if acquiesced under it as valid as any act of the Court. It is common to apply to the Court "to discharge the order of a judge made at chambers," who supports the proceeding, and shows that the order is valid as to its effect, if it be not discharged. Indeed, if it becomes necessary to enforce it by attachment, there must be a motion to make it a rule of Court. The validity of a judge's order can be impeached only two ways, either by appealing to the Court to set it aside, or, if made in vacation, by applying in the next term to set aside the other made in vacation.

5. *WOOD V. PLANT*. M. T. 1807. C. P. 1 Tunt. 47.

Per Cur. It is true that the order is made by a judge at chambers; but still it is to be regarded as the order of the Court. The effect of these orders was much considered, in the case of the *King v. Wilkes*, 4 Burr. 2570; they are as binding as any act of the Court, though they are not entered and made rules of Court, unless it be necessary to enforce them by attachment.

6. *LENCH V. PARTIGER*. H. T. 1779. K. B. Doug. 68.

The defendant had been brought up on a Wednesday, to be discharged under the Lords' act, but was remanded, on the plaintiff's paying him two shillings and four-pence, and giving him a note for the payment of the like sum on Wednesday in every subsequent week. The defendant applied to be discharged, on the ground that the two shillings and four-pence had not been paid, nor the note made agreeable to the directions of the statute, which is that the payment of the groats shall be made on Monday in every week, and the note framed accordingly. It was admitted that the payments had been regularly made the first and every Wednesday till the defendant's application to be discharged. Willes, J., was of opinion, that the defendant was entitled to his discharge, and made an order for that purpose. It was then moved for a rule to show cause why that order should not be set aside, and the plaintiff be at liberty to retake the party; and stated that the constant practice in this court had been to pay the groats on that day week on which the party was brought up, and so successively, and to make the note for payment on those days. In this he was confirmed by the officers of the court. He cited also *Shaw v. Gimbert*, in Barnes, where, in the Common Pleas, the money was made payable on a Tuesday. It was urged, that the spirit of the act had been complied with, as the prisoner had been paid weekly. That, in another case in the same book, where the money was made payable on Monday, the plaintiff having slipped that day, but having tendered it on the Tuesday, the Court of Common Pleas refused to discharge the prisoner; *Beech v. Paxton*, widow. Lord Mansfield. This case must be considered with a reference to the application which was made in the vacation; and a single judge having then a complete authority, I do not see how the Court now can control the order. Mr Justice Willes consulted the other judges at Searjant's Inn before he signed it, and they thought it right. They afterwards sent him word that they doubted, and he sent to recall his order, but it was too late.

7. *REX V. WILKES*. H. T. 1770. K. B. 4 Burr. 2569

Per Cur. Before a judge's order can be enforced, which is by attachment, it must be made a rule of Court.

Judgment in Civil Proceedings. See *tit. Abatement; Inquiry; Writ of Error; Writ of; Practice; Scire Facias.* [638]

I. RELATIVE TO THE DEFINITION AND GENERAL NATURE OF, p. 641.

II. ENTIRETY OF, p. 642.

III. RELATIVE TO THE JUDGMENT FOR THE PLAINTIFF.

(A) IN ABATEMENT. p. 643. See *ante*, tit. Abatement.

(B) — BAR.

(a) *By default*.. 1st. *Non sum informatus nil dicit*.

1. Grounds for signing of.

(a) Generally, p. 644. (b) For want of a plea, rejoinder, &c. or not pleading specially, p. 644. (c) For pleading a plea not applicable to the nature of the action, p. 648. (d) For pleading a sham plea, p. 651. (e) For pleading otherwise in an irregular manner, p. 653.

2. Mode of signing, and entry of, p. 658. 3. Setting aside for irregularity, p. 659. 4. Setting aside, when regular, on terms, p. 661. 5. Waiving of, p. 665.

(b) By confession.

1st. On cognovit. See *ante*, tit. Cognovit., 2nd.—warrant of attorney.—See *post*, tit. Warrant of Attorney.(c) of nonsuit. See *post*, tit. Nonsuit. (d) On demurrer. See *ante*, tit. Demurrer. (e) After verdict. See *post*, tit. Verdict. (f) *Non obstante veredicto*, p. 665.

IV. RELATIVE TO JUDGMENT FOR DEFENDANT.

(A) IN ABATEMENT. See *ante*, tit. Abatement.

(B) — BAR.

[639] (a) As in case of nonsuit. See *post*, tit. Nonsuit. (b) Of non pros. See *post*, tit. Non Pros. (c) On demurrer. See *ante*, tit. Demurrer. (d) — *nul tiel* record. See *post*, tit. Nul Tiel Record. (e) After verdict. See *post*, tit. Verdict.

V. RELATIVE TO JUDGMENT IN PARTICULAR CASES.

(A) AS TO PARTICULAR ACTIONS.

(a) Real. See tits. Assize; Writ of; Darrien Presentment; Formedon; Right; Writ of.

(b) Mixed. See tits. Dower; Ejectment; Quare Impedit; Waste.

(c) Personal. 1st. Ex Contractu. See tits. Account; Assumpsit, Covenant; Debt; Detinue.

2nd. Ex delicto. See tits. Case; Replevin; Trespass; Trover.

(B) AS TO PARTICULAR WRITS.

See tits. Certiorari; Extent; Habeas Corpus; Inquiry; Writ of; Mandamus; Prohibition; Scire Facias.

(C) AS TO PARTICULAR CAUSES OF ACTION.

See tits. Adultery; Annuity; Apprentices; Arbitration, and Award; Assault and Battery; Bail; Bastardy; Bills and Notes; Bond; Bribery; Common; Compounding; Contract; Copyhold; Deceit; False Imprisonment; Forcible Entry; Game; Highway; Inclosure, Insurance; Libel; Malicious Arrest; Malicious Prosecution; Mesne Profits; Mortgage; Party Wall; Penalty; Scandalum Magnatum; Slander; Tithes; Waste.

[640] (D) AS TO PARTICULAR PERSONS.

See tits. Attorney; Bail; Bankrupt; Baron and Feme; Churchwarden; Clerk of the Peace; Constables; Excise, and Custom House Officers; Executors and Administrators; Infant; Informer, common; Justices of the Peace; King, the; Outlaws; Overseers, Paupers; Sheriff; Surveyors.

(E) AS TO MISCELLANEOUS PROCEEDINGS.

See tits. Abatement; Admiralty; Amendment; Attaint; Audita Querela; Demurrer; Discontinuance; Error; Feigned Issue; Foreign Attachment; Hundred; Motions and Rules; New Trial; *Nolle Prosequi*; Outlawry; Payment of Money into Court; Qui Tam; Remanet; Repleader; Sessions; Sham Plea; Staying Proceedings.

VI. RELATIVE TO STAYING PROCEEDINGS ON. See tit. Staying Proceedings.

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- (a) In *K. B. and C. P.*, p. 677. (b) In *Exchequer*, p. 679.
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I. RELATIVE TO THE DEFINITION AND GENERAL NATURE OF.*

* A judgment is the decision or sentence of the law, given by a court of justice, as the result of proceedings instituted for the redress of injury. The language of judgments, therefore, is not that "it is decreed or resolved by the Court, but it is considered," (*consideratum est per curiam*) that the plaintiff do recover his debt, damages, possession, and the like; or that the defendant do go quit; which implies, that the judgment is not so much the decision of the Court, as the sentence of the law pronounced and declared by the Court, after due deliberation and inquiry. Judgments in civil cases are of four kinds: 1st. Where the facts are admitted by the parties, but the law disputed; as in this case of judgment upon a demurrer. 2nd. Where the law is admitted, but the facts disputed; as in case of judgment upon a verdict. 3rd. Where both the fact and the law are admitted by confession; as in a *cognovit actionem* or *retraxit*, on the part of the defendant, or *nolle prosequi*, on the part of the plaintiff. 4th. By default of either party in the course of legal proceedings; as in cases of judgment by *nil dicit*, or *non sum informatus*, where the defendant has omitted to plead or instruct his attorney to do so, after proper notice given; or in cases of judgment by *non pros.*, *nonsuit*, or, as in case of a *nonsuit*, where the plaintiff omits to follow up his proceedings. The conduct of the defendant implies that he has no defence to offer; that of the plaintiff, that he has no grievance which he can prove. These four species of judgments, again, are either interlocutory or final. 1st. Interlocutory judgments are, in ordinary accep-

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There is no right to judgment on a declaration where the counts are inconsistent. But a judgment which is capable

[643] of separation may be reversed in part, and affirmed as to the residue.

So a judgment may be given *pro tanto*.

II. RELATIVE TO THE ENTIRETY OF.

1. *REX v. MAYOR, &C. OF CAMBRIDGE.* E. T. 1788. K. B. 2 T. R. 461.

Per Cur. On a declaration in which two inconsistent counts are joined, the plaintiff cannot have judgment.

2. *REX v. AMERY.* H. T. 1792. K. B. 4 T. R. 537.

Pér Cur. The judgment given for damages is entire; and if it cannot be supported against all, it must be reversed *in toto*; because the Court cannot sever the damages, and say that each defendant shall be severally liable for his proportion of them; but even in these cases, if different parts of a judgment can be severed, the Court will reverse it in part, and affirm it for the residue, as appears by the case quoted from 2 Roll. Rep. 136.

3. *COBB v. BRYAN.* H. T. 1803. C. P. 3 B. & P. 343.

To an avowry for 120*l.* rent in arrear. the plaintiff pleaded "that the said 120*l.* is not due," and the defendant joined issue thereon; and at the trial it appears that 24*l.* only is due, upon which the plaintiff objects that the evidence does not support the issue joined by the defendant.

Per Cur. We do not see upon what principle it can be contended that those matters which are aided by the finding of the jury, are to be considered as not found by the jury, because an objection was taken previous to the finding. The reason upon which such matters are considered as aided appears to us to be that the substance of the issue is found; and, therefore, any information in the issue shall not be regarded. The principal question in this case, is, whether the defect in these pleadings can be taken advantage of after verdict? There are many issues to which a party may demur, if he think proper; and yet, if he chose to go on to trial, he may nevertheless take advantage of the fault after verdict, as where an issue is completely immaterial; for no verdict, cures that defect. The issue in this case in form is, whether 120*l.* be due or not? The plaintiff having insisted upon that in his plea which is no answer to the avowry, namely, that 120*l.* is not due, and the avowant having joined tation, those incomplete decisions whereby the right of the plaintiff is established, but the quantum of damages sustained by him is not ascertained, for this is a matter which in general cannot be fairly done without the intervention of a jury. 2nd. Final judgments are such as at once finish the proceedings, by declaring that the plaintiff either has, or has not, entitled himself to recover the remedy he sought, and by ascertaining to what amount he shall obtain redress. It will appear, then, that judgments after verdict, judgments in the action of debt for a sum certain, judgments by confession, and all judgments in favour of the plaintiff, are final: but in every other case, as on default or demurrer, in actions of assumpsit, covenants, case, trespass, trover, &c., the judgment is interlocutory in the first place, deciding only that the plaintiff ought to recover, but leaving it to be ascertained by a writ of inquiry to what amount. On the return of this inquiry, the right to recover having been established, and the amount of the damages having been ascertained by a jury, final judgment is entered up. In assumpsit, covenant, case, replevin, and trespass, the judgment for the plaintiff is, that he recover his damages and costs against the defendant, to be levied, when the plaintiff is entitled to costs in an action against an executor or administrator, of the goods of the testator or intestate in the hands of the defendant, if he hath so much thereof in his hands to be administered; and if not, then the costs to be levied *de bonis propriis*. In debt, the judgment for the plaintiff is, that he recover his debt, together with his damages and costs, to be levied, when the plaintiff is entitled to costs in an action against an executor or administrator, of the goods of the testator or intestate, if, &c., and if not, then the damages and costs to be levied *de bonis propriis*. In annuity, the judgment is for the plaintiff to recover the annuity; and the arrearages of the same, as well before the bringing of the action as afterwards, up to the time when judgment is given. In detinue, it is for the plaintiff to recover the goods, or their value, with damages and costs. In replevin, the judgment for the defendant, at common law, is to have a return of the goods, or, upon the statute 17 Car. 2. c. 7. to recover the arrearages of rent or value of the goods and costs; and in other actions, the judgement for the defendant upon a non pros., nonsuit, or verdict, is to recover his costs only. After final judgment signed, execution may be immediately taken out against the defendant's person or goods; but in order to charge him in execution, or bind his lands, or proceed against him by action of debt or scire facias on the judgment, or against his bail on the recognizance; or if a writ of error be brought, it is necessary that the judgment should be entered of record, and docketed, and the judgment-roll carried to and filed in the treasury of the court. The judgment-book produced by the officers of the court is not evidence of the judgment entered therein; though the record has not been made up, and though the person interested in proving the judgment be no party to the action; and it seems that any person who is interested in a judgment may compel the plaintiff to enter it up.

issue upon that fact, it appears that 120*l.* is not due, but that a less sum is due; and we are to determine whether the plaintiff shall be permitted to take advantage of his own bad pleadings. If this had been an issue sent from the Court of Chancery to try whether 120*l.* were due or not, there must have been a verdict for the defendant. In this case, however, where the substance of the issue is to ascertain whether any rent was in arrear, and the jury have found that 24*l.* was due, we see no reason, in the absence of any precedent precisely in point, why the avowant should be precluded from having the benefit of that finding. The objection is on the record, and may be moved again either in arrest of judgment or upon a writ of error.

Rooke, J. The cases cited, 5 T. R. 246; Cro. Eliz. 82; have satisfied me that the verdict as found, may be supported. If the plaintiff be dissatisfied with our opinion, the point, being on the record, will be opened to him in another court.

III. RELATIVE TO JUDGMENT FOR PLAINTIFF.

(A) IN ABATEMENT.* See *ante* tit. Abatement.

(B) IN BAR.

(a) By default.

1st. *Non sum informatus nil dicit.*†

1. Grounds for signing.

(a) Generally.

MOORE V. GREEN. E. T. 1815. K. B. 1 Salk. 213.

Per Cur. Where there is a judgment by default, and that is where the party hath a day certain, and is demandable, and being demanded, doth not appear, judgment may be given against him by default. See Co. Entr. 269; Rast. Ent. 173. b.

(b) *For want of a plea,† rejoinder, &c. or not pleading specially.*

1. PETRIE V. FITZROY. H. T. 1793. K. B. 5 T. R. 152.

In debt on bond there being no rejoinder, the plaintiff entered up judgment by default, as for want of a plea, not of a rejoinder. It was now moved to discharge that rule, saying it was unnecessary to enter all the pleadings, and could answer no other purpose than that of creating expense.

Per Cur. Wherever it becomes necessary to enter all the pleadings on the record, as in the instance put of a *nolle prosequi* as to part, it may be done; but generally speaking it can answer no purpose, and is perfectly unnecessary. The

* When a plea in abatement is regularly put in, the plaintiff must reply to it, or demur.—If he reply, and an issue in fact be thereupon joined, and found for him, the judgment is peremptory, quod recuperet; but if there be judgment for the plaintiff, or demurrer to a plea in abatement, or replication to such plea, the judgment is only interlocutory, quod respondeat ouster.

† Judgment goes by default, properly speaking, wherever, between the commencement of a suit and its anticipated decision in court, either party omits to pursue in the regular method the ordinary measures of prosecution or defence. Hence judgment by default, when it goes against the defendant, is an implied admission of the charges advanced; when it goes against the plaintiff, it is an implied admission that he cannot support those charges. Judgment by default is either by *nil dicit*, where the defendant appears, but says nothing in bar or proclusion of the action; or by *non sum informatus*, where his attorney says he is not informed of any answer to be given thereto. Judgments of non pros., nonsuit, and as in case of a nonsuit (which are against the plaintiff); though usually treated as a class by themselves, must, inasmuch as arising from omissions or irregularities at various stages of the action, be considered equally judgments by default of the plaintiff, as judgments of *nil dicit* or *non sum informatus* by default of the defendant.

‡ On the expiration of the time for pleading, a rule to plead having been given, and a plea demanded when necessary, the plaintiff's attorney should search for a plea, if not delivered to him, with the clerk of the papers, who receives special pleas in the King's Bench, and with the clerk of the judgment, who keeps the general issue-book at the King's Bench Office, or at the prothonotary's office in the Common Pleas; and if no plea be found at either of those offices, the plaintiff's attorney may sign judgment as for want of a plea.

§ Or if the defendant do not plead to a new assignment, or join in demurrer when necessary; or, in the K. B., if he do not return the paper or demurrer-book in due time. If the defendant make default at the trial, this is not such a default as will entitle the plaintiff to sign judgment, but he must proceed regularly to verdict, or in the same manner as if the action were defended.

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When defendant has a day certain given him in court, and being demanded, does not appear, the court may give judgment against him by default. Judgment may be signed for want of a rejoinder as well as for want of a plea. §

and, in truth, if the defendant do not re-rejoin, it is considered as an abandonment of the plea.—Rule absolute.

- [645] 2. *HERON v. HERON*. T. T. 1761. K. B. 1 Blac. Rep. 376; S. C. 2 Wils. 117. *CAVE v. ARON*. M. T. 1769. C. P. 3 Wils. 33; 1 Moore, 431.

And when a defendant is under judge's order to plead in the terms of pleading is usually, and pleads a false plea of judgment recovered; Or other plea which is not issuable, the plaintiff may consider it as a nullity, and sign judgment;

Defendant obtained a rule for time to plead, pleading *issuably*, rejoining *gratis*, and taking short notice of trial. Afterwards, the defendant pleaded a judgment in the court of Common Pleas, upon which the plaintiff signed judgment; and now defendant moved to set aside this judgment for irregularity. But it being proved by affidavit that the plea was in fact a false plea, the court held that this was not an issuable plea, within the meaning of the rule for time, and, therefore, discharged the rule for setting aside the judgment with costs.

See 2 Chit. Rep. 292.

3. *KILWICK v. MIADMAN*. H. T. 1757. K. B. 1 Burr. 59. S. P. WAGSTAFFE *v.* LONG. H. T. 1758. C. P. 2 Barnes, 263. *VALLEY v. GARDINER*. H. T. 1780. 1 Tidd. 478.

Time was given by a judge's order to plead (*viz.* until two days before the assign-day of this present term) on the usual terms of pleading *issuably*, &c. This order was not obtained till after the four days' rule for pleading was expired. Before the term, and within the time allowed by the judge's order, the defendant pleaded a plea of tender, which plea was entitled (as it was agreed that it regularly might be) as of the preceding term. Counsel showed cause, *viz.* that it was a fair honest plea, in its own nature, and that it was within time, not being after imparlance, but as of the last term; and also that it was an issuable plea, within the meaning of the judge's order; though he acknowledged that plea in abatement (though in strictness indeed issuable) would not be so, because it tended to delay the plaintiff. The Court concurred entirely in the argument in support of the regularity of the plea, and the motion was denied.

4. *WATERFALL v. GLODE*. E. T. 1789. K. B. 3 T. R. 305.

So, where several pleas are pleaded, one of which is not issuable it will vitiate all the others;

On a motion to set aside the interlocutory judgment in this cause for irregularity, it appeared that the defendant, being under an order to plead *issuably*, had pleaded several pleas, all of which were issuable, except one, on which the plaintiff signed judgment as for want of a plea. This it was contended was irregular, because that one plea, which was not issuable, might be considered as a nullity, and the others were a sufficient compliance with the order. It was *contra* insisted that the one plea, which was pleaded in disobedience to the order, vitiated all the others; and that it had been repeatedly determined in such cases that the plaintiff might sign judgment as for want of a plea. And the Court being of this opinion, discharged the rule.

5. *CUMING v. SHARLAND*. E. T. 1801. K. B. 1 East, 411. S. P. SUTTON *v.* WADDILOVE. M. T. 1742. C. P. Barnes, 314.

Or pleads *issuably* to part of the declaration and a sham demurrer to the rest;

The bill was filed in last Hilary term, and the defendant obtained further time to plead by a judge's order, till the 27th of February, upon the terms of pleading *issuably*, rejoining *gratis*, and taking short notice of trial for the then next assizes at Exeter. The declaration, which was in *assumpsit*, consisted of four counts upon special agreements, and four other general money counts; and on the said 27th of February, the defendant filed special demurrers (alleging sham causes of demurrer) to the four first counts, and pleaded *non assumpsit* and the bankruptcy of the defendant to the four last counts. It was objected to the defendant's agent at the time, that the special demurrers, not affecting the merits of the case, were not issuable pleas within the meaning of the judge's order; and it was proposed to him to strike them out and put in issuable pleas, so that the cause might proceed to trial at the ensuing assizes. This, however, being denied, and the regularity of the pleading insisted upon, the plaintiff on the second of March signed judgment in the cause generally upon the whole declaration, as for want of a plea, and gave notice of executing a writ of inquiry on the 16th of March, being the commission day of the assizes at Exeter; after which the plaintiff again offered to waive the judgment and to proceed to trial on the merits, if the defendant would withdraw his special demurrer, but without effect. The plaintiff then proceeded to execute his writ of inquiry. On motion to set it aside,

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Per Cur. The defendant here seeks to set aside proceedings which have been induced by his own fault. An action was brought against him, and not being prepared to answer it at the appointed time, he applied for indulgence for further time to plead, which the Court granted upon the usual terms, which in effect are no more than these, that he should bring forward his real defence, if he had any, at once, and not entangle the plaintiff in the mere forms of pleading. The defendant after this undertaking had the option of denying the whole charge, or of letting judgment go by default as to such parts of it as he was ready to admit, and denying the rest; instead of which, for the sake of perverting justice and creating delay and expense, he only pleaded issuably to some of the counts, and put in sham demurrers to the others. This is not a fair compliance with the judge's order, but a palpable evasion of it; and, therefore, we are glad that he has met with his desert; that the plaintiff has signed judgment as for want of plea, which he had a right to do. The consequence is, that this rule must be set aside with costs.

6. *HILL V. DYBALL.* H. T. 1820. K. B. 2 Chit. Rep. 292.

The action was brought to recover the sum of 11*l.* 2*s.*; and before the return of the writ, the defendant took out a summons before a judge at chambers, calling on the plaintiff to show cause why, upon payment of the debt and costs, the proceedings should not be stayed. The judge accordingly made an order to that effect, and the plaintiff's costs were taxed; but neither the debt nor costs were paid by the defendant. In consequence of this the plaintiff delivered a declaration, with notice to plead in eight days. Before the time was out, the defendant took out a summons before another judge, for further time to plead; and the plaintiff having demanded a plea, the defendant filed a plea of judgment recovered, upon which the plaintiff signed judgment; and the question was, whether the judgment so signed was regular.

Per Cur. It is obvious in this case, that the defendant obtained the order for staying the proceedings, on payment of the debt and costs, merely for the purpose of gaining time and delaying the plaintiff. It was highly improper for the defendant to plead a judgment recovered, after the judge had made an order for paying the debt and costs. No instance can be mentioned in which the defendant has been allowed to plead judgment recovered, after such an order has been made and the costs taxed. Indeed, the practice now is to make it a part of the terms of the order for staying the proceedings, that if the defendant does not pay the money within a given time, the plaintiff shall be allowed to sign judgment.

7. *MACDONNELL V. MACDONNELL.* T. T. 1802. C. P. 3 B. & P. 174.

A declaration in debt demanded 2,000*l.* and contained several counts, each of which stated a debt of 224*l.* 7*s.* 4 1-2*d.* The defendant, after having obtained time to plead upon the usual terms of pleading issuably, put in the plea that the defendant did not owe to the plaintiff the said sum of 224*l.* 7*s.* 4 1-2*d.* concluding to the country; whereupon the plaintiff signed judgment as for want of a plea. But the Court were of opinion, that as the plea was pleaded to the whole declaration, it must be considered as no plea within the judge's order.

—Rule discharged. See 1 D. & R. 473.

8. *THELLUSSON V. SMITH.* H. T. 1793. K. B. 5 T. R. 152. ANON. E. T. 1819. K. B. 1 Chit. Rep. 355. n. *EAMES V. WILLIAMS.* E. T. 1822. K. B. 1 D. & R. 359.

Per Cur. If this plea cannot be supported, the plaintiff should have de-

* The rule upon this subject is thus:—If a plea begin as an answer to part only, and is in truth as answer only to that part, 1 Saund. 28. n. 1, 2, 3; or if it begin as an answer to part, but afterwards answer more, 9 Saund. 28. n. 3; 1 Str. 303. but see 2 B. & P. 427; the plaintiff should sign judgment for that part of the cause of action which the plea in its commencement does not profess to answer; otherwise, if, instead of doing so, he demur or plead over, the whole action will be discontinued. If, on the contrary, the plea begin as an answer to the whole, but in truth is only answer to part, the plaintiff cannot sign judgment for the part not answered, but should demur, because the whole plea is bad; 1 Saund. 28. n. 1, 2, 3. 296. n. 1.

ed if a plea tho' informal, goes to the substance of the action* murred to it, instead of signing judgment as for want of a plea. Where, indeed, a plea has appeared on the face of it to be a dilatory plea, the Court has in some cases, gone the length of saying that the plaintiff might treat it as a nullity; but this plea is not of that kind, for it goes to the substance of the complaint; though whether it be a formal and good plea it is not necessary to consider now; if it be bad the plaintiff must demur to it.

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(c) For pleading a plea not applicable to the nature of the action.

1. STAFFORD v. LITTLE. H. T. 1728. C. P. Barnes, 257.

If *nil debet* be pleaded to an action of *assumpsit*, This was an action upon the case on a promissory note, whereto defendant pleaded *nil debet*; the plaintiff looked on the plea as a nullity, and signed judgment for want of a plea, which the Court held to be regular.

2. PERRY v. FISHER. T. T. 1805. K. B. 6 East, 549. S. P. BRENNEN v. E-GAN. M. T. 1811. 6 Taunt. 164.

Or *non assumpsit* to an action of debt; The declaration in debt was delivered on the 11th of May, and the rule to plead given on the day before, and no rule to plead was given afterwards; which was admitted to be irregular. But after the 11th, a plea of *non assumpsit* was entered; on which the plaintiff afterwards signed judgment, as for want of a plea; and it was held on the authority of Lockhart v. Mackreth 5 Term Rep. 1. that the plea of *non assumpsit* to an action of debt was a nullity.

3. GRAY v. SIDNEFF. E. T. 1803. C. P. 3 B. & P. 395.

Declaration in this case was as follows: "London to wit: Simeon Sidneff was attached to answer George Gray and John Gray in a plea of trespass on the case." The defendant pleaded thus: "And the said Simeon in his own proper person comes and prays judgment of the said declaration, because he says, that by a certain act of parliament made and passed at the parliament holden at Westminster, in the third week of Easter, in the first year of the reign of our late Sovereign Lord Henry the Fifth, late King of England, it was, amongst other things, ordained and established, that in every original writ of actions, personal appeals, and indictments, and in which the exigent shall be awarded in the names of the defendants, in such writs, original appeals and indictments, additions should be made of their estate or degree or mystery, and of the towns or hamlets or places and counties of which they were or be, or in which they be or were conversant; and if by process upon the said original writs, appeals, or indictments, in the which the said addition be omitted, any utlagaries be pronounced, that they be void, frustrate, and holden for none, and that before the utlagaries be pronounced, the said writs and indictments shall be abated by the exception of the party where in the same the said additions be omitted; wherefore, inasmuch as in the name of him the said Simeon addition is not above made of his estate or degree or mystery, be the said Simeon prays judgment of the said declaration, and that the same be quashed," &c. A rule nisi having been obtained, calling on the defendant to show cause why the plaintiff should not be at liberty to sign judgment, as for want of a plea. *Per Cur.* As this case has been argued upon the motion now before the Court, we do not think it right to withhold our judgment at present, until the plaintiff shall have done that which he now seeks our leave to do, though, perhaps, it would have been the more regular mode of proceeding for him to sign judgment as for want of a plea, without any application to the Court, and thus have put the defendant to move to have that judgment set aside. The plea in this case, after stating the statute of additions, prays that the declaration may be quashed. We have not found a single case in which it has been held necessary to insert an addition in the declaration. The writ and declaration ought to agree; and formerly, if there was any essential variance between them, advantage might have been taken of that circumstance. It remains to be proved, however, that any repugnance exists in the present case. It never has been the practice for many years to insert an addition in declarations in this court; and the question now is, whether the plea which has been put in can be received? That question appears to us to have been decided by the case of Murray v. Hubbard; there, on application being made

* Or if one of several pleas be merely demurrable; King v. Barber, 1 Tidd, 610.

to the court for leave to treat a plea in abatement as a nullity, the Court refused to make any rule in that stage of the proceedings; but judgment having been signed as for want of a plea, the question came before the court, and was decided upon grounds which are extremely applicable to the present case. Lord Chief Justice Eyre there says, that "so long as it is the practice of the Court to issue the mesne process first, and to allow an original to be sued out afterwards, if necessary to substantiate the proceedings, no advantage can be taken after the appearance of a misnomer in the mesne process." In that case the plea assumed that the original writ had misnamed the defendant, because the declaration recited that he was arrested by a different name from that by which he was declared against. It has long been the practice not to grantoyer of original writs; and though, perhaps, such refusal may be considered in the first instance to have been a strong measure, yet it was the necessary consequence of assuming a jurisdiction without original. From that moment it became necessary to treat all pleas of this sort as absolute nullities; otherwise the fiction under which the court assumed its jurisdiction would have been turned into a mere engine of delay. When Courts adopt a fiction they must necessarily support it. The Court of King's Bench would not allow a party to say that he was not in the custody of the marshal; nor the Court of Exchequer that he was not the King's debtor. By this doctrine no right is taken away from the subject, nor is he proceeded against in any way injurious to himself. If such a plea were to be allowed, the Master of the Rolls would issue a new writ, agreeable to the declaration. If the Court thinks itself at liberty to proceed without an original, it will never admit a mode of proceeding to be adopted which will have the effect of compelling the plaintiff to sue out that original, which the Court feels itself justified in acting without. We think, therefore, that as the plea amounts to a mere nullity, the plaintiff is at liberty to sign judgment for want of a plea.—Rule absolute.

See 7 East, 383; 1 B. & P. 665; 3 Taunt. 839.

4. COPPIN v. CARTER. M. T. 1786. K. B. 1 T. R. 462.

Debt on the 10 Anne, c. 26. s. 109; and the defendant having pleaded not guilty, the plaintiff signed judgment as for want of a plea. The court said that this plea was certainly not a nullity, and indeed it should rather seem that this is a good plea; for as this is an offence against a penal statute, the defendant, by such a plea, says that he is not guilty of the offence.

5. SMITH v. JONES. M. T. 1823. K. B. 3 D. & R. 621.

Plea to *assumpsit* on a promissory note that defendant, "did not undertake," omitting the words "or promise," "in manner and form," &c., with a conclusion to the country. On motion to set aside the judgment with costs, for irregularity, the Court ruled that the plea was sufficient to sign judgment, but on account of the carelessness of the defendant in pleading such a plea, they made the rule absolute, without costs.

6. DALE v. BEER. H. T. 1806. K. B. 7 East, 333.

Debt *qui tam*, as for the poor of the parish of West Mousely, in Surrey, to recover certain penalties upon the stat. 13 Geo. 2. c. 19. for entering a running pony. The defendant put in a plea of *nil debet*, entitled, "Walter Beer, at the suit of Thomas Dale;" on which the plaintiff signed Judgment as for want of a plea, on the ground that the plea was improperly entitled: this being a *qui tam* action, the plea should have been entitled, "Dale, *qui tam*, &c.;" and now upon a rule for setting aside the judgment for irregularity, with costs, the court were of opinion, that the judgment was irregularly signed; that the plea was well enough entitled, without the addition of the character in which the plaintiff sued; and made the rule absolute.

7. ATTWOOD v. BONACIAH. T. T. 1822. K. B. 1 D. & R. 473.

Debt for a sum of 1800l. Plea, that the defendant did not owe the said sum of 10l. above demanded, &c. Issue joined thereon. On notice of the trial being given, the mistake was discovered. It was moved for a rule to show cause why, unless the defendant would alter his plea, the plaintiff should not be allowed to sign judgment as for want of a plea, or why the defendant should not be ordered to amend his plea, and go to trial.

But not guilty to an action of debt on a penal statute; Or that the defendant "did not undertake" omitting the words "or promise," &c. in an action of *assumpsit*, is not a nullity.

Nor will the omission of *qui tam* to the plaintiff's name in the title of the plea in a penal action warrant the plaintiff in signing judgment. And it seems that a plea in debt for 1800l. that defendant

does not owe the sum of 10l. above demanded, etc. is sufficient, and the amount may be rejected as surplusage.

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A sham plea is not, in general, deemed such a nullity as to enable the plaintiff to sign judgment, Unless it be palpably fictitious, and wholly unactioned by the practice of the courts; Or be bad in form as well as fictitious;

Or when two sham pleas are calculated to raise two or more issues requiring different modes of trial;
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Or so ingeniously framed as to make it necessary for the plaintiff's attorney to obtain further aid;

Abbot, C. J. How can we order the defendant to amend his plea? He may plead what plea he chooses. If you wish to withdraw your similiter, and demur to the plea, the court will grant you that permission. I am inclined to think that the plea is sufficient to meet the declaration, it being sufficiently covered by the averment that the defendant, does not owe the money above demanded, and that the words "ten pounds" may be rejected as surplusage.

(d) *For pleading a sham plea.*

1. *WEBB v. Holt.* T. T. 1744. K. B. 2 Stra. 1234.

The defendant pleaded a sham plea; the plaintiff obtained the common rule, that the defendant should plead peremptorily on the morrow and that such plea should not be waived; and served it on the defendant's attorney, who taking no notice of it, the plaintiff signed judgment; which the Court, on the master's report, held to be irregular, the first plea standing, if the defendant did not lay hold of the opportunity given him of altering it.

2. *BLEWITT v. MARSDEN.* T. T. 1808. K. B. 10 East, 237. *HOPWOOD v. WRIGHT.* E. T. 1806. C. P. 2 N. R. 188.

A sham plea was pleaded of judgments recovered in the Court of Pie-Poudre in Bartholomew fair, in terms palpably fictitious, and out of the regular course; the Court reprobated the practice, and suffered the plaintiff to sign interlocutory judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings.

3. *LAMB v. PRATT.* T. T. 1822. K. B. 1 D. & R. 577.

This was an action upon a bill of exchange, which was not due until Hilary vacation; and to the plaintiff's declaration of Easter term, the defendant pleaded a judgment recovered as of Hilary term, the bill not being in fact then due; and on the authority of *Phillips v. Bruce*, 1 Chit. Rep. 526. the plaintiff well as fictitiously treated the plea as a nullity, and signed judgment.

Per Cur. The judgment, at all events could not have been recovered until Easter term and therefore it is quite clear that this plea is false and insensible. If defendants will plead judgment recovered for the purpose of delay, let them at least take care that their pleas are good in form.—Rule discharged. See 1 B. & P. 445; 3 Id. 395; 5 T. R. 152; 4 Taunt. 668 *Barnes*, 252; 1 Chit. Rep. 355.

4. *THOMAS v. VANDERMOOLEN.* M. T. 1818. K. B. 2 B. & A. 197. Id. 777.

The Court held that where a sham plea was pleaded, calculated to raise issues requiring different modes of trial, the plaintiff may sign judgment as for want of a plea, and the Court ordered the defendant or his attorney to pay the costs occasioned by the plea and the costs of the rule for correcting the proceedings.

5. *BARTLEY v. GODSLAKE.* M. T. 1818. K. B. 2 B. & A. 199. *SHADWELL v. BERTHOUD.* E. T. 1822. K. B. 5 Id. 750. S. C. 1 D. & R. 446. S. P. *HOPWOOD v. WRIGHT.* E. T. 1806. K. B. 2 N. R. 188 *WHITE v. HOWARD.* M. T. 1810. C. P. 3. Taunt. 339. *SAMUELS v. DUNNE.* H. T. 1811. C. P. Id. 386.

The sham plea was such as to make it necessary for the plaintiff's attorney to consult counsel, and thereby cause delay and expense. A rule was obtained to show cause why the plaintiff should not be at liberty to sign judgment, as for want of a plea; and why the defendant or his attorney, should not pay the costs of plea, and of this application. It was for the defendant contended, that this plea did not come within the rule laid down against sham pleas, as it did not require a double replication with two modes of trial, the plaintiff being at liberty to deny the indorsement of the bill, and the assignment of the judgment, concluding to the country. But the Court said that this being an ingenious plea, which the plaintiff's attorney could not be expected to understand, would put him to the necessity of consulting counsel, and thereby oc-

* Or the fabricated nature of the defence stated in it be demonstrated by other circumstances; *Hill v. Tybalt*, 1 Arch. K. B. 137. 2nd Edit.

casion delay and expense. It was therefore a very improper plea to put upon the files of the court. Upon this ground they made the rule absolute; and to prevent such pleas being pleaded in future, they directed that the defendant's attorney should pay the costs of the application.

6. VINCENT v. GROOME. H. T. 1819. K. R. 1 Chit. Rep. 182.

Declaration on *assumpsit*. Plea, *non assumpsit* to the second and subsequent counts, concluding to the country. Plea to the first count of a set-off on a recognisance alleged to have been acknowledged by the plaintiff to the defendant in the Court of Common Pleas, with a *proul paret* of a record in this court. It was contended therefore, that the attorney having framed the plea according to his client's instructions, he ought not to be made personally liable for the costs; and so much of the rule as related to him ought to be discharged. But the Court said: this is a very improper plea, and the attorney ought to pay the costs.—Rule absolute.

7. MERRINGTON v. BECKET. T. T. 1823. K. B. 2 B. & C. 81; S. C. 2 D. & R. 661; *contra*, 1 D. & R. 359.

***Assumpsit* for goods sold.** Defendant pleaded a sham plea precisely similar to that pleaded in Richley v. Proome, 1 B. & C. 286; and upon the authority of that case a rule nisi had been obtained that the plaintiff might be at liberty to sign judgment as for want of a plea, upon an affidavit stating that the plea was in every respect false. The case of Richley v. Proome was decided upon the authority of what fell from Lord Holt in Pearce v. Blake; that case, however, is only an authority to show that an attorney who puts a false plea upon the record may be fined; and if the defendant had not been an attorney, the Court might have perhaps granted a rule calling upon the attorney to show cause upon what ground he put the plea upon the record; and if he had not shown sufficient grounds, he might have been fined for his improper conduct; but it would be going too far to treat the plea as a nullity, unless the defendant verified it. On a subsequent day the Lord Chief Justice said, that calling upon the attorney to show by what authority he put a sham plea upon the file, might not be effectual, and that the court would consider whether some means could not be adopted for the prevention of sham pleading, without breaking in upon any established principle. In the mean time, however, until some such regulation could be devised, the practise must remain as it has been heretofore. Rule discharged.

(c) For pleading otherwise in an irregular manner.

1. SAMUELS v. DUNNE. H. T. 1811. C. P. 3 Taunt. 386.

Per Cur. Although a defendant conducts his cause in person, if he files a special plea, it is a nullity, unless it be signed by a sergeant or counsel.

2. PETHER v. SHELTON. M. T. 1725. K. B. 1 Stra. 638.

The defendant pleaded a tender, with *profert in curia* of the money, and on a certificate that no money was paid in, it was moved to set aside the plea.

Per Cur. It is no plea, and the plaintiff might sign judgment.

3. HUGHES v. ALVAREZ. M. T. 1725. K. B. 2 Ld. Raym. 1419; S. C. 1 Stra. 639.

The defendant put in a plea in abatement, after having oyer of the original, the original was not returned, and that the plaintiff had not found pledges.—And upon motion, this plea was set aside, because it was put in without an affidavit of the truth of it; for though this appeared by the writ upon the oyer; and in cases where a matter is pleaded in abatement, which appears upon the record (as variances) there needs no affidavit by the act for the amendment of the cause, 4 Anne, c. 16. s. 11; yet the Court held, that this did not appear upon the oyer of the writ, for nothing appears but the writ itself; but this is a fact which ought to be verified by affidavit.

4. HARE v. LLOYD. E. T. 1787. K. B. 1 T. R. 693.

The defendant having pleaded a judgment recovered, was ruled to abide by his plea or to plead such a plea as he would abide by; and on his afterwards pleading any other plea than the general
* Ruling a defendant to abide by his plea does not preclude him from treating a sham plea as a nullity; 2 B. & A. 197; 5 M. & S. 518.

But in general the Court will not interfere by allowing the plaintiff to sign judgment on producing an affidavit [653] of the plea being fictitious, when the usual and ordinary sham pleas are pleaded.*

If a plea requiring counsel's signature be not signed, Or the defendant plead a tender without paying money in to court, Or a plea in abatement without an affidavit to verify it;

issue, after being ruled to abide by his plea; [654] pleading a special plea, the plaintiff signed judgment, which the defendant moved to set aside for irregularity. It was contended that the judgment was regularly signed for want of a plea; for that the defendant, after having ruled to plead such a plea as he would abide by, could not plead a special plea. The Court, on the authority of the case of *Prout v. Dawson*, which the master read from his note book, discharged the rule.

5. *WALLACE v. CUMBERLAND*. T. T. 1791. K. B. 4 T. R. 370. 371.

Or after craving oyer, do not set forth all the conditions of the bond, or set forth a false oyer in his plea; Debt on bond. The defendant, after craving oyer of the bond on condition, set out in her plea the condition, omitting the reciting part which preceded the condition; it was moved to quash the plea, because it did not contain a true recital of the whole of the condition. The court said that by craving oyer the defendant undertook to set out in her plea the whole condition, including the recital, in so many words; and that not having done so, the plea was bad. That the plaintiff would have been warranted in signing judgment as for want of a plea; and that though in this case no time was gained by the defendant's attempt, yet in most cases a false recital was made for the purpose of delay; and, therefore, to prevent a similar attempt in future, they would not permit the defendant to amend. Rule absolute.

6. *VENN v. CALVERT*. H. T. 1792. K. B. 4 T. R. 578.

As is bailable actions pleading before bail is put in and perfected; The declaration was delivered *de bene esse*, and the plea was filed before the bail was perfected; after the bail had justified, the plaintiff signed judgment as for want of a plea. Lord Kenyon, C. J. The question is, whether the perfecting of bail, which did not take place till after the plea was filed, shall make the plea a good one from the time of perfecting bail? I think not. As the plea was a nullity at the time when it was filed, it did not become a good plea by perfecting the bail afterwards. The case which has been cited goes a great way to determine the present. *Per Cur.* Rule discharged.

7. *BOND v. SMART*. M. T. 1819. K. B. 1 Chit. Rep. 735. *DOUGLAS v. GREEN*.

T. T. 1820. K. B. 2 Id. 7.

Or without taking the declaration out of the office; Rule to show cause why the interlocutory judgment signed in this cause, and all subsequent proceedings, should not be set aside, with costs, for irregularity; the irregularity being, first, that there had been no demand of a plea served in the cause; and second, that judgment was signed after a plea pleaded. It was said the declaration was filed in the office; and the defendant's attorney, in order to get rid of the necessity of paying the fees at the office for stamps, &c. writes to the plaintiff's attorney for a copy of the declaration which the latter refuses, the declaration being then filed. This is a practice that is now become quite common, in order to prevent the payment of fees. The defendant then pleads without taking the declaration out of the office, and for that reason the plaintiff is entitled to sign judgment for want of a plea; and though his plea was a nullity, it nevertheless waived the necessity for a demand of plea. Abbott, C. J. The practice certainly is that the defendant has no right to plead without taking the declaration out of the office. He is bound to do that. If the defendant here has pleaded, he has pleaded irregularly. His plea amounts to a waiver of the necessity for a demand of plea. It however answers no purpose, and therefore the plaintiff is entitled to sign judgment.

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8. *LOCKHART v. MACKRETH*. T. T. 1793. K. B. 5 T. R. 661.

Or the plea be entered in the general issue-book, instead of being delivered to the plaintiff's attorney; Debt on bond by original: the defendant, having privilege of parliament, neglected to appear at the return of the summons, and the plaintiffs issued out a *distringas* against him; the defendant having appeared on the 30th of May, three days before the end of Easter term, the plaintiffs on the same day delivered a declaration against him, with notice to plead in four days, and a rule to plead was given; on the 31st, a plea was demanded; on the 3d of June,

* And unless he plead in abatement, 2 Ent. 406; 13 Id. 170; 2 D. & R. 252; and in non-bailable actions, if the defendant plead before he has filed common bail, or entered an appearance, the plaintiff may treat the plea as a nullity, and sign judgment, unless he has waived his right of doing so by having previously demanded a plea; 2 Chit Rep. 8.

† Or delivered instead of filed; see 2 T. R. 278.

the defendant demanded oyer and a copy of the bond, which was given the next day. On the 5th of June, the defendant made this entry in the general issue book, with the clerk of the judgments—"The defendant pleads the general issue of *solvit ad diem*." On the 14th of June, the plaintiffs signed judgment for want of a plea. Upon this the defendant moved to set aside the judgment, and the writ of *fiery facias* executed thereon, on two grounds; 1st, that as the declaration was not delivered four days before the end of the term, he was entitled to an imparlance; but, 2dly, if he were not, that his plea was regular. The Court (after conferring with the master) said that the judgment was regularly signed. That the plea of *solvit ad diem*, concluding with a verification, could not be entered in the general issue-book; but that, though it were not good as a plea, because improperly entered, it operated as a waiver of the defendant's right to imparlance; like the common case where a defendant puts in an improper plea in abatement, which, though not good as a plea in abatement, supersedes the necessity of a rule to plead.

9. ALBANY V. GRIFFEN. H. T. 1735. C. P. Ca. Pr. 126; S. C. Pr. Reg. 306; Barnes, 239. CIBSON V. HONDRAE. E. T. 1820. K. B. 1 Chit. Rep. 647.

On a piece of stamped paper, the defendants say they are not guilty, without delivering the plea at length; the plaintiff signed judgment for want of a plea. The Court said, that it was no defence; so the judgment was held regular.

10. TURNER V. WILLIAMS. E. T. 1738. C. P. Barnes, 259; S. C. Pr. Reg. 607. MARGEREM V. MAKILWAINE. T. T. 1807. C. P. 2 N. R. 509.

Defendant pleaded by an attorney of another court, and plaintiff, looking upon the plea as a nullity, signed judgment, which was held to be regular; and the rule to show cause why the judgment should not be set aside was discharged.

11. SAMUELS V. DUNNE. H. E. 1811. C. P. 3 Taunt, 386.

Motion to set aside judgment upon an affidavit of the plaintiff's attorney, that he, having found the plea and special demurrer above mentioned, had been misled by them. The Court directed an inquiry to be made which of the two pleas was first filed, and upon the officer reporting that the simple plea of *non assumpsit* was first filed, the Court held that the second plea was a deceit, which should not avail the defendant.

12. CHRISTIE V. WALKER. H. T. 1823. C. P. Bing. 187.

The plaintiff signed judgment as for want of a plea, because the rule to plead several matters was erroneously entitled C. v. W. instead of C. v. W. and another. The Court set the judgment aside, without costs, affidavit being made, that the pleas were true, and that defendant had a good defence.

13. JENNINGS V. WEBB. T. T. 1786. K. B. 1 T. R. 277.

The declaration was delivered on the 16th of May, and on the roll the defendant pleaded in abatement. This he contended was too late; for as the four days which are allowed to plead in abatement are both inclusive, the time of pleading such a plea expired on the 19th. In support of the rule, insisted that the four days were not both inclusive in this court. According to the general practice of this court, whenever a certain number of days is allowed for pleading, or otherwise, one of them is taken exclusive: and there is no reason for forming an exception in this particular instance. In the case of Long v. Miller, see 2 Stra. 1192; the rule which was given on the 7th of May expired on the 11th, which shows that this Court reckoned one of the four days in which the defendant is allowed to plead in abatement, exclusive. In some instances the party has even more than four days to plead in abatement; as where the declaration is delivered within the last four days of the term preceding, and there is a special imparlance. The Court thought this question must have been settled, and desired it to stand over, that they might have an opportunity of inquiring into it; and the next day, Buller, J. read a note of the fol-

* Or plead in abatement after a general imparlance, or to the jurisdiction of the court after a special imparlance.

[657] lowing case of *Gowler v. Hendy*. The plaintiff and the defendant were both attorneys in the Court of King's Bench, and the plaintiff sued the defendant by attachment of privilege, and arrested, and held him to bail. On the 8th of May, a declaration was delivered; and on the 11th, at 11 o'clock at night, a plea in abatement of privilege was delivered at the plaintiff's house, which the next day he objected to, and demanded a plea in the common form; and, as soon as the time was expired, signed judgment. It was moved to set aside the judgment, with costs, for irregularity, insisting that the plea in abatement was well delivered, and that the defendant had all the day of the 12th of May to deliver it. *E contra*, it was insisted that such a plea could not be delivered after the 11th; for that in cases of pleas in abatement, the four days were reckoned inclusive, and that the defendant ought to deliver it at a seasonable time in the evening, and not at midnight. In many cases the Courts have held nine o'clock late enough for the delivery of pleading or other proceedings. Willes, J., concurred in both these objections; and on the master's telling Lord Mansfield that the plea was irregular in another respect, viz. being delivered, whereas it ought to have been filed; the Court rejected the motion made by the defendant, and the judgment stood.

14. *MORRIS V. HUNT*. H. T. 1819. K. B. 1 Chit. Rep. 93.

But a judge's summons, returnable before judgment signed, tho' after the time for pleading has expired operates as a stay of proceedings; therefore, the plaintiff cannot sign judgment without first attending the summons.

An action was brought by the High Bailiff of Westminster against the defendant, as one of the candidates at the last general election for the city and liberties of Westminster, to recover his share of the expense of erecting hustings, paying poll-clerks, &c. under the 53d Geo. 3. c. 152—"An act to continue until the 1st day of January, 1819, an act made in the 51st year of his present Majesty, to explain and amend the laws touching the election of knights of the shire to serve in parliament for England, respecting the expenses of hustings and poll-clerks, so far as regards the city of Westminster." On the 21st of November, the declaration was served upon the defendant, with notice to plead in eight days, but at the request of the latter, six weeks' further time was given for that purpose. Before the expiration of this time the defendant desired a better particular than had already been delivered of the plaintiff's demand, and at the same time obtained ten days' further time to plead, which expired on Sunday, the 17th of January. A better particular had been sent to the defendant on the 7th of January, but it did not actually reach him until the 17th. On Monday, the 18th of January, the defendant's agent being dissatisfied with the particular delivered, took out a summons for further time to plead, in order that a better particular might be given; but this summons was not attended to, it being returnable at eleven o'clock in the morning of that day. On the morning of the 19th, the plaintiff's attorneys were served with a second summons, which they also neglected to attend; but on the third being served, they attended the judge at chambers, and then it was stated that judgment had been signed at three o'clock in the afternoon of the 18th of January, as for want of a plea, it being contended that the judgment so signed was regular. Under the circumstances, the learned judge refused to hear the fresh summons; and the judgment remaining in force, the defendant applied by counsel on the first day of this term to set it aside for irregularity.

Per Cur. It appears in this case, that the summons was returnable at 11 o'clock in the morning, and that the judgment was not signed until many hours afterwards. The first and second summonses were not attended to, and there [658] is no appearance to the third until after the judgment is signed. It seems to us that, the summons being returnable before the plaintiff had a right to sign judgment, the plaintiff is irregular; he must have used the greatest expedition in getting his judgment signed so soon. Under these circumstances, we are of opinion that the judgment was irregular, and that the rule for setting it aside must be made absolute.

15. *MINNS V. BAXTER*. M. T. 1785. K. B. 1 T. R. 16. *S. P. THOMPSON V. RYALL*. H. T. 1791. K. B. 4 Id. 195. *S. P. SHEPSON V. HUGHES*. M. T. 1792. K. B. 5 Id. 35.

Cause was shown against a rule, which had been obtained by Shepherd last

Trinity term, calling on the defendant to show cause why the judgment of *non pros*, which had been signed in this cause, should not be set aside for irregularity. The irregularity consisted in this:—The plaintiff had a four days' rule, to bring in the issue-roll, which expired the 14th of June last; the defendant on that day searched in the office, and the roll not being then brought in signed judgment of *non pros* the next day at twelve. This practice, the counsel contended, was regular. *Contra*. It was insisted, that as in fact the judgment was not signed till after the roll was actually brought in the next morning on the 15th, it was then irregular to sign judgment, without making another search. It was also urged that this was not like a case where a party puts himself in contempt; as for instance, where an attachment is moved against him; because there the person moving for such attachment being once entitled to it, does not waive his right, by omitting to take advantage of it on the very day. But it is like the case of a plea, where, if it be not put in on the day the rule expires, and the other party does not take advantage of it immediately, he may deliver his plea any time before judgment is actually signed against him. And the Court was of that opinion. And it appearing that the plaintiff's attorney had told the defendant's attorney of the irregularity, and had desired the matter might be rectified, without its being brought before the Court, but that he had refused, the Court made the rule absolute with costs.

2nd. Mode of signing, and entry of.*

[659]

* A judgment by default is interlocutory or final. When the action sounds in damages, as in *assumpsit*, *covenant*, *trover*, *trespass &c.*, the judgment is only interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained. And the judgment for the plaintiff in these actions is also interlocutory on demurrer or noli tuel record. In debt the judgment is commonly final; though, where the damages are considerable, a writ of inquiry is sometimes necessary for assessing them. In actions on the statute 2 & 3 Edw. 6. for not setting out tithes, there must be a writ of inquiry after judgment by default, to ascertain the value of the tithes; so in an action of debt for foreign money, a jury must find the value of the money; and it seems, that in debt for use and occupation, a writ of inquiry is necessary, after judgment by default, before signing final judgment. An interlocutory judgment is signed on four-penny stamped paper, with the clerk of the judgments in the King's Bench, or prothonotaries in the Common Pleas; an incipitum being first entered on a roll of the term it is signed. Final judgment is signed on a ten shilling stamped paper; and no rule for judgment being necessary, the plaintiff may in general proceed immediately to tax his costs, and take out execution. In the King's Bench by bill, or in the Common Pleas, judgments by default are entered on a roll of the term of which they are signed; but in the King's Bench by original they are entered of the term of the declaration; and in the latter court, the entry is the same, whether the judgment be for want of a plea, or for not rejoinding, surrebutting, or joining in demurrer, or for not returning the paper-book; but in the Common Pleas, where the pleadings are supposed to be entered of record as they are pleaded, the judgment-roll states the previous proceedings, and the particular default upon which the judgment is given. In the King's Bench the entries are made by the plaintiff's attorney; in the Common Pleas by the clerk of the judgments, with whom the writ of inquiry is left for that purpose; and there is no necessity, in that court, for a subsequent continuance between the parties, after judgment by default and writ of inquiry awarded; but in the King's Bench it is said to be otherwise. After interlocutory judgment, the amount of the damages sustained by the plaintiff is ascertained, either by reference to the master in the King's Bench, or prothonotaries in the Common Pleas, or by writ of inquiry. In general, a writ of inquiry is awarded; but this is a mere inquest of office, to inform the conscience of the Court, who, if they please, may themselves assess the damages, with the assent of the plaintiff, or direct them to be assessed by the proper officer. Where judgment by default is signed as to part, and issue is joined as to the residue, a special venire is always awarded, *tam ad triandum quam ad inquirendum*, as well to try the issue as to inquire of the damages; and the jury who try the issue in the cause assess the damage for the whole, 11 Co. 5; see the form of the award of the venire, Arch. Forms, 337. So, where there are several defendants, if some let judgment go by default, and others plead to issue, a similar special venire shall be awarded, and the jury who try the issue shall assess the damages against all the defendants; 11 Co. 5; 2 B. & P. 163; see the form of the award of the venire, Arch. Forms, 337. But in actions where the plea of one defendant enures to the benefit of all, as in actions upon contracts; 1 Lev. 63; 1 Sid. 76; Ca. Pr. C. B. 107; Pr. Reg. 162; 3 T. R. 662; if the defendant fails in obtaining a verdict against those who have pleaded, he cannot have damages assessed against the others who let judgment go by default; for the contract being entire, the plaintiff must succeed against all the defendants or none. In actions *ex delicto*, on the contrary, if the plaintiff do not succeed against the defendants who plead, he may still have his damages assessed against those who allowed judgment to

3rd. *Setting aside for irregularity.**

1. POPE v. TURNER. E. T. 1813. C. P. 4 Taunt. 818.

A judgment by default is irre-
gular, and may be set aside when the defendant is in an action not bailable, has not been served with a copy of process, or there has been no declaration regularly filed, and notice thereof given to the defendant.

The defendant was served on the 9th of February with a writ of *capias*, returnable in eight days of the Purification; and within an hour after he was served with a notice of declaration in chief. He never took the declaration out of the office. On the 19th of April he was served with notice of a writ of inquiry. The Court and the officers agreed that the practice enabled the defendant to treat the declaration and notice as a nullity.

2. FRAAS v. PARAVICINI. T. T. 1812 C. P. 4 Taunt. 545.

Or when it is signed before the defendant's appearance or without entering a rule to plead, or demanding a plea when necessary before time for pleading is expired; or after a plea has been regularly delivered or filed.

A plea being delivered before the rule was filed, the plaintiff signed judgment—On a rule nisi to set aside the judgment for irregularity, on the ground that it was signed after plea pleaded, Gibbs, J. I am quite clear the plea was well pleaded, otherwise a plaintiff would mislead a defendant who should plead according to the notice, by afterwards filing another declaration, to which the defendant would not plead. In this case, the plaintiff delivering his declaration, indorses thereon a notice to plead in eight days; the defendant need not have paid any attention to that notice; but if he waives the irregularity, and does plead to the declaration delivered the plaintiff cannot, I think, insist that the defendant must plead to his declaration filed, and that his plea to the other is a nullity.

3. DAVIS v. HUGHES. E. T. 1797. K. B. 7 T. R. 206.

The writ was returnable in Trinity term last, at which time the defendant gave a *cognovit*; but judgment had not been signed till Hilary term last, after which, in the same term, common bail was filed. This was contended to be irregular, according to the case of *Smith v. Painter*, where it was held that the plaintiff cannot file common bail according to the statute after the succeeding term, to which the writ is returnable. *Contra*. The irregularity was admitted; but contended that the defendant was estopped from objecting to it, after having admitted the justice of the demand by giving a *cognovit*; and that it was sufficient that the judgment now appeared on the record to have been regularly entered up, the plaintiff having since filed common bail, *nunc pro tunc*, for the defendant. And of this opinion were the Court.—Rule discharged.

4. GAIME v. GOODMAN. E. T. 1816 K. B. 2 Smith, 391. S. P. MUNSTER v.

COLES. T. T. 1820 K. B. 2 Chit Rep. 237. S. P. DOWNES v. NICHOLS.

M. T. 1728. C. P. Ca. Pr. C. P. 69. 145. Prac. Reg 127. BARNES, 256.

MOFFAT v. CARTER. M. T. 1805 C. P. 2 N. R 75. 6 Price, 15.

When the irregularity is in the delivery, filing, or notice of declaration, the application for setting aside the judgment should be made, if possible, two days before the time appointed for the execution of the writ of inquiry.

Rule to show cause why an interlocutory judgment should not be set aside for irregularity. The irregularity, which was admitted, was the signing judgment without demanding a plea after common bail was filed. The common bail was filed on the 7th of February, and the demand of plea was made on the 6th. The interlocutory judgment was signed on the 6th of April, on which day notice was given of executing a writ of inquiry for the 4th of March. The defendant did not make his motion to set aside this judgment till the 7th of go by default; 2 Sira. 1108. 1222; unless the plea of those who pleaded prove that the plaintiff could have no cause of action against any of them, 2 Ld. Raym. 1370; 1 Sira. 610; 8 Mod. 219; for the tort is several as well as joint.

* In what cases set aside. If the judgment itself be irregularly signed, or if any of the previous proceedings upon the part of the plaintiff be irregular, and the irregularity be not waived by any act of the defendant, or if judgment be signed, when in fact the defendant has not been guilty of any default, the Court upon motion will set aside the judgment. It is said that this motion must be made two days before inquiry executed, 1 Sellen, 845; or, if the writ of inquiry be executed in vacation, notice of the motion should be given two days previously to the plaintiff's attorney or agent; Tidd 499.

† Or if a defendant accept a declaration, and act as if an appearance had been entered for him, the Court will not afterwards permit him to set aside a judgment on the ground of his not having appeared, see 1 N. R. 309. And when the plaintiff declares absolutely before the defendant has appeared, he cannot sign judgment after plea for want of his appearance; Tidd. 614.

‡ Or attended and cross-examined the witnesses on the execution of a writ of inquiry; see 4 Taunt. 545.

May. The Court held that this application was too late. It should have been [661] made, as it might have been, before the plaintiff had incurred the expence of And in the executing his writ of inquiry. C. P. there can be no motion to set aside a judgment the last day of the term, unless it appear that the defendant could not sooner apply.

5. *SOUTHHOUSE v. DYE*. E. T. 1736. C. P. Ca. Pr. 180.

No motion to set aside judgment the last day of the term unless it does appear that the defendant could not sooner apply.

6. *LORIMER v. LULR*. H. T. 1819. K. B. 1 Chit. Rep. 134. *BRAITHWAITE v. BROWN*. H. T. 1819. K. B. Id. 238.

Rule obtained on a former day for setting aside a judgment in an action on simple contract and execution levied thereon with costs. It was admitted that the defendant had duly appeared before judgment signed, and consequently such judgment was irregular; but he submitted that as the affidavit of the plaintiff's attorney stated that the defendant had applied for the indulgence, and that the judgment had been signed by mistake, the rule ought to be absolute. Without costs, and that the plaintiff ought to be precluded from bringing any action for trespass for the levy under the irregular execution. The court said: "When a defendant applies to us to set aside proceedings for irregularity, we have a discretionary power of imposing upon him just and equitable terms as a condition or qualification of our interference; and we shall not suffer for a party so applying to prosecute an action of trespass, merely on account of such a slip in practical accuracy. When a case of malicious issuing or undue execution of process is laid before us, we will impose no such restraint; but this is not a case of that description.—Rule absolute without costs.

4th. *Setting aside when regular, on terms.*

1. *ASSISTED v. LEE*. M. T. 1720. K. B. 1 Salk. 462. *WOOD v. CLEVE*. T. T. K. B. 2 Id. 518. *MATTHEWS v. STONE*. T. T. 1732. C. P. Barnes, 242. *SMITH v. BLUNDELL*. H. T. 1819. K. B. 1 Chit. Rep. 226. *BELL v. THURFF*. E. T. 1819. K. B. 1 Id. 331.

Upon payment of costs the Court will set aside a judgment, though it be regularly entered, if the plaintiffs have not lost a trial; and so is the common course in C. B.

2. *PRICE v. SIMPSON*. T. T. 1808. C. P. 1 Taunt. 343.

An attachment against the sheriff was set aside late in Easter term; upon the usual condition of pleading issuable, and taking short notice of trial for the sittings after the term. The plaintiff delivered his declaration on the 2nd of June, which was the first of the sittings after the term, indorsed to plead *instantly*, accompanied with the demand of a plea. The defendant supposed that he should satisfy the rule by pleading issuable, and paying money into court within the four first days of the present term, since it was impossible that he should plead issuable in time for trial on the first day of the sittings. The Court held that the true sense of the rule was, that the defendant should so plead, that the cause might come to trial at the sittings after Easter term, and that he ought therefore, to have pleaded *instantly*, since he would thereby have enabled the plaintiff to proceed to trial at adjournment day.—Rule discharged.

3. *MATTHEWS v. STONE*. T. T. 1733. C. P. Barnes, 242. *SMITH v. BLUNDELL*. H. T. 1819. K. B. 1 Chit. Rep. 226.

The writ was returnable in term, and a declaration left in the office, and afterwards an appearance entered by plaintiff according to the act of parliament; but no notice of the declaration was given till the 12th of April for defendant to plead within the first four days of this term. A motion was made to set aside the judgment, the declaration having been left in the office before the appearance entered; and a rule nisi was granted, which afterwards the Court discharged, the declaration being a declaration well delivered only from the time of the notice; but the Court made another rule to set aside the judgment upon payment of costs, pleading an issuable plea, and taking short notice of trial.

4. *FOX v. GLASS*. H. T. 1734. K. B. 2 Stra. 823; S. C. 1 Keny. 343. 1 Burr. 568. *DOBBS v. PASSER*. E. T. 1733. K. B. 2 Stra. 975.

The Court had long refused to set aside a judgment which was regular, on the term

when necessary, so as to put the plaintiff in the same situation as if the judgment had not been set aside; And this course may be pursued in an ejectment as well as other actions;

[663]
But a regular judgment can not be set aside to allow the defendant to take advantage of mere technical rules unconnected with the merits, as arbitrary rules of pleading; Or to avail himself of an inequitable defence

But the statute of limitations,

Bankruptcy.

[664]
And infancy, are re-

putting the plaintiff in as good a condition. But upon pressing the practice of C. B. the Court broke through it in this cause and now the practice was so every day.

5. *DOBBS v. PASSER*. E. T. 1734. K. B. 2 Stra. 975; S. C. 1 Keny. 308.

BARCLAY v. HUNT. M. T. 1766 K. B. 4 Burr. 1996. *GOODTITLE v. BADTITLE*. E. T. 1803. C. P. 4 Taunt. 820. 8 Id. 538; S. C. 2 More, 581.

The plaintiff signed judgment in ejectment, and before he had lost any trial the defendant applied to set it aside, though strictly regular, upon payment of costs, and taking notice of trial; which the plaintiff refused. And the Court being applied to, a distinction was offered between ejectments and all other actions, because the right was not bound, but a new ejectment might be brought. *Per Cur.* That distinction held formerly, in many instances where it is now exploded; you would not formerly have a new trial as you now may; and great conveniences may arise from changing the possession; timber may be felled, &c. And as the Common Pleas makes no difference, and we have got into their way in all other actions, it is proper to do so here too.

See 4 M. & S. 300; 7 Taunt. 9—48; ante, tit. Ejectment.

6. *WILSON v. ROGERS*. M. M. 1745. K. B. 2 Stra. 1242.

The plaintiff was sued in the Court of Conscience in London, and was taken in execution, for which he brought trespass and false imprisonment; and now moved for liberty to inspect the book of the proceedings, which upon debate was granted, so far as related to the suit against himself only upon this ground, that every man has a right to look into the proceedings to which he is a party.

7: *WILLET v. ATTERTON*. T. T. 1748. K. B. 1 Bl. Rep. 35; S. C. *STAFFORD v. ROWNTREE*. E. T. 1782. K. B. 1 Tidd. 615.

The plaintiff had signed judgment in *assumpsit*, which was owing to a mistake made by the defendant's attorney's clerk. Motion was made to set it aside on payment of costs: see Salk. 402. It was suggested on the part of the plaintiff, that the defendant meant to plead the statute of limitations. The Court would not set aside the judgment, unless the defendant would undertake to plead the general issue.

8. *STADHOLME v. HODGSON*. E. T. 1788. K. B. 2 T. R. 390. S. P. *MADDOCKS v. HOLMES*. H. T. 1798. K. B. 1 B. & P. 228.

The defendant after having obtained an order for time to plead on the terms of pleading issuably, pleaded *non assumpsit*, a set-off, and the statute of limitations. It was moved to set aside the last of these pleas, because it was not competent to the defendant to plead any plea which was not to go to the merits. The Court said, that the reason for rejecting the plea of the statute of limitations after time to plead, was, that it excluded the merits; and when the defendant asked a favour of the Court, it was under the express condition of pleading to the merits only. That the rule was positive, and could not be dispensed with in any instance.—Rule absolute.

9. *EVANS v. GILL*. T. T. 1797. C. P. 1 B. & P. 52.

A rule for setting aside a regular judgment on an affidavit of merits, upon the ground that the defendant meant to plead his bankruptcy. This is not more a plea of merits than infancy, coverture, usury, or the statute of limitations; and in those cases the Court has refused similar applications. Bankruptcy is not a meretorious, but a mere legal defence, against a conscientious claim; it is not such a discharge but that a previous debt may be a consideration for a new promise, as in cases of infancy, and the statute of limitations. *Per Cur.* Supposing this to be a fair bankruptcy, we should permit the party to make use of it as a defence, when he has given up all his effects; it would be cruel to charge him from a neglect in the attorney, the necessary consequence of which would be that he must go to gaol.

10. *DELAFIELD v. TANNER*. M. T. 1814. C. P. 5 Taunt. 856; S. C. 1 Marsh, 391.

Rule to set aside interlocutory judgment, which had been signed in this action as for want of a plea. The ground on which the rule was resisted, was that though the defendant had sworn to merits, his intention was to plead his

infancy. Lord Chief Justice Gibbs. This may be a very good plea, and I see no objection to the judgment being set aside, on payment of costs. I respectively considered pleas to the merits.

Per Cur. Rule absolute. See Stra. 12. 420; 1 B. & P. 228.

11. *ANON.* E. T. 1813. C. P. 4 Taunt. 835.

The plaintiff having signed an interlocutory judgment by the neglect of the defendant, a rule nisi to set it aside was obtained, upon an affidavit of merits. It appeared that the action was brought against the defendant, who was an executor, for a simple contract debt of the testator, and that there were specialty debts of the testator outstanding, to the amount of all the personal assets which had come to the defendant's hand. Counsel showed cause, upon an affidavit, which stated that the defendant was not only executor, but also heir to the testator; that land of the value of 200*l.* a year had descended to him, which was liable for the specialty debts; that the plaintiff had offered to refer all matters, and to empower the arbitrator to marshal the assets in a course of equitable distribution, and was willing to wait for the payment of his own debt until the land should be sold, and the purchase-money received; which offer the defendant had refused; and upon this ground the counsel contended, that as it was discretionary in the court to set aside the judgment, and as the defendant had refused so liberal an offer, he was not entitled to the indulgence of being let in to plead there were specialty debts unsatisfied. But the Court thought that, as the defendant had refused the very fair terms which had been offered him, they ought not to interpose in his favour, and discharged the rule.

12. *MORRIS v. HUNT.* H. T. 1819. K. B. 1 Chit. Rep. 97.

It appeared that in an affidavit in support of the motion, the deponent swore to merits, without describing himself either as the defendant's agent or attorney; and the Court said that it was not competent for a third person to swear to merits, without describing himself as the attorney or agent for the litigating party; and therefore that part of the affidavit on the part of the defendant could not be received.

13. *NEESON v. WHYTOCK.* H. T. 1811. C. P. 3 Taunt. 403.

Rule nisi, on the usual terms, for setting aside an interlocutory judgment upon an affidavit of merits made by A. Mitchell, clerk to the defendant's attorney. Cause was shown, upon the ground that the deponent had not sworn that he was either the defendant's attorney, or managing clerk to the defendant's attorney. The court admitted that the objection was correct and discharged the rule.

14. *PRINGLE v. MARSAK.* H. T. 1822. K. B. 1 D. & R. 155.

Time was given to put in other bail, on condition that the defendants should produce an affidavit of merits before the drawing up of the rule. It was now produced on affidavit, stating that the defendant was advised and believed that he had a good defence to the action, but the affidavit omitted to state the words upon the merits. The Court said, this was not a compliance with the terms of the condition imposed, and therefore refused the grant for further time.

4. *Waiving of.*

1. *ELWOOD v. ELWOOD.* T. T. 1732. C. P. Ca. Pr. C. P. 124; S. C. Prac. Reg. 294. 4 Barnes, 251.

A motion was made to set aside the judgment in these causes, and the irregularity complained of was, that the rules to plead were given before notice of the declarations being left in the office were served upon defendants, the appearances having been entered by the plaintiff, and the proceedings upon the act of parliament. It appeared that plaintiff's attorney finding his mistake waived his judgment, struck out the old, and gave new rules to plead, and after they were expired, signed judgments again; and the question was, whether he could do so without leave of the Court.

Per Cur. It is only one entry upon record in each cause, and the former judgments appear by the prothonotary's book to be signed by mistake, and the latter are regular.

(f) Judgment "*Non obstante verdicto.*"

When the defence put upon the record is not a legal defence to the action in point of substance, and the defendant obtains a verdict, the Court, upon motion, will

[666]
give the defendant leave to sign judgment,*

Where, in an action, for a libel, the defendant pleaded the general issue, and eight special pleas, and the jury found a verdict for the plaintiff on some pleas with out assessing damages, and for the defendant on the other pleas the Court, on motion to enter up judgment for the plaintiff *non obstante veredicto*, allowed it.†

In cases of judgment *non obstante veredicto*, the course is not to stay the entry of judgment upon the verdict by rule, but to enter the verdict upon record, and then the judgment for the plaintiff *non obstante veredicto*.
[667]
This species of judgment is in general interlo-

1. In what cases granted.

1. STAPLE V. HAYDON. T. T. 1703. K. B. 1 Salk. 173; S. C. Carth. 370; S. C. 6 Mod. 1. 2 Ld. Raym. 924. CARBONEL V. DAVIES. M. T. 1719. K. B. 1 Stra. 394. BROOM V. PRICE. H. T. 1821. K. B. 2 Id. 873. CRAVEN V. HANLEY. M. T. 1737. C. P. Barnes, 255; S. C. Com. Rep. 548. Willes, 364. Barnes, 266. REX V. PHILIPS. E. T. 1757. K. B. 1 Burr. 301. SYMONERS V. REGEM. M. T. 1776. K. B. Cowp. 510. PEYTT V. BERKELY. M. T. 1776. K. B. 2 Doug. 749. NEWMAN V. ANDERSON. T. T. 1806. C. P. 2 N. R. 225. WELLS V. MILES. T. T. 1821. K. B. 4 B. & A. 560.

Where the defendant pleads an ill plea; but the matter, if well pleaded, might have amounted to a good bar or justification, judgment can never be given against the defendant, as by confession; but where the matter, though never so well pleaded, could signify nothing, judgment may in such case be given as by confession; as if in case for calling him thief, the defendant should justify for that he received a thief.

See Burr. 301; Stra. 394; Cowp. 510; 1 Moore, 199; 8 Taunt. 413.

2. LEWIS V. CLEMENTS. T. T. 1820 K. B. 3 B. & A. 702.

This was an action for a libel, which professed to contain a narrative of the proceedings of the Court of Insolvent Debtors, on the application of a person of the name of Carter, to be discharged from imprisonment. It begins "Shameful conduct of an attorney," and then proceeds with a detail of speeches of counsel, the examination of the insolvent, and the observation of the judge. The defendant pleaded that the supposed libel contained a correct account of what actually passed in the court on the occasion alluded to. Issue was joined, and a verdict was found for the defendant on some pleas, and for the plaintiff on others. An application was made to the court by the plaintiff, that he might have judgment notwithstanding the verdict, on the ground that the pleas were bad in point of law. *Per Cur.* The matter was argued before us at Serjeant's Inn, and we are all of opinion that the pleas are insufficient. The question, whether a person may publish a correct narrative of proceedings in a court of justice, which contains matter of defamation of a third person, not a party to the suit, it is not necessary to decide, because in this case the narrator has not confined himself to what actually passed in the court, but has prefaced the statement with the words "Shameful conduct of an attorney." He has, therefore, taken upon himself to make that allegation concerning the plaintiff. We think, therefore, the pleas are bad, and that there must be judgment for the plaintiff notwithstanding the verdict.

2. How entered and subsequent proceedings.‡

1. BROADENT V. WILKS. T. T. 1742. C. P. Willes, 364; S. C. Barnes, 266. Verdict for defendant on two issues joined upon not guilty, and a justification. By the special plea the trespass was confessed; judgment was ordered to be entered for the plaintiff's, notwithstanding the verdict, the trespass being confessed by the special plea. The true method is, not to stay the entry of judgment upon the verdict by rule, but to enter the verdict upon record, and then judgment for the plaintiff, *non obstante veredicto*.

In cases of judgment *non obstante veredicto*, the course is not to stay the entry of judgment upon the verdict by rule, but to enter the verdict upon record, and then the judgment for the plaintiff *non obstante veredicto*.

2. CLEMENT V. LEWIS. E. T. 1822. C. P. 3 B. & B. 297.

An account of certain proceedings in a court of law was headed in a newspaper "Shameful conduct of an attorney." Pleas to a declaration in libel that the alleged libel contained a faithful and true account of proceedings

* It is always upon the merits, and never granted but in a very clear case; see 2 Smith, 9; S. C. 8 Taunt. 237; S. P. Rocher v. Townsend, M. T. 45 Geo. 8. K. B. 2 Tidd. 963.

† But if a defendant pleads a justification insufficient in law, upon which time is taken, and the issue found for him, the Court will give the plaintiff leave to enter up judgment notwithstanding the justification.

‡ For this purpose, a motion for a rule to show cause must be made, which is afterwards made absolute or discharged in the usual way. It may be made at any time before judgment is given (2 Stra. 845.), though a new trial has been previously moved for Doug. 745.

in a court of law were held ill. The jury having found for the defendant on six out of eight pleas comprehended in the last of two issues, and for the plaintiff on the residue of those pleas, and on the first issue without assessing damages; and the plaintiff having, pursuant to the decision of the Court of King's Bench, entered up, as to the pleas found for the defendant, judgment *non ob-*stante verdicto, with an award of a writ of inquiry, and final judgment for the damages found by the inquisition, &c.; a Court of Error reversed the judgment of the Court of King's Bench, as to the award of the writ of inquiry, and the final judgment thereon; remitted the record to the Court of King's Bench, and directed that Court to award a *venire de novo* to try the first issue and the last, as far as related to the pleas on which the finding was for the plaintiff; holding that the verdict found for the plaintiff on the first issue and on the last (as far as regarded the pleas on which the finding was for the plaintiff) was void, because no damages had been assessed.

3. *SLEY V. ROBINSON*. M. T. 1788. K. B. 2 T. R. 758.

To an action founded on a custom for poor and indigent householders living in A., to cut and carry away rotten-boughs and brances in a chase. The defendant justified in trespass under such a custom, which was found for him. The court set aside the verdict on that issue, and entered a verdict for the plaintiff, with nominal damages.

4. *DA COSTA V. CLARKE*. H. T. 1800. C. P. 2 B. & P. 376.

The prothonotary in this case not having allowed to the avowant any costs upon the pleadings subsequent to the pleas in bar, nor any costs of the trial, the counsel obtained a rule to show cause why he should not be directed to review his taxation, and allow to the avowant the costs upon all the pleadings. The Court held, if an avowant in replevin after trial and verdict for the plaintiff, obtain judgment *non obstante verdicto*, in consequence of the plaintiff's pleas in bar being bad, he is not entitled to any costs upon the pleadings subsequent to the pleas in bar, because he should have demurred to them. In consequence of the plaintiff's pleas in bar being bad, he is not entitled to any costs upon the pleadings subsequent to the pleas in bar, because he should have demurred to them.

VII. RELATIVE TO THE ARRESTING OF.—See also Issue; Repleader; *Venire de novo*.

(A) GROUND FOR.

1. *PECHEY V. HARRISON*. T. T. 1607. K. B. 1 Ld. Raym. 232. 1 Salk. 77. [668]
Id. 315. *SUTTON V. BISHOP*. H. T. 1769. K. B. 4 Burr. 2287.

The plaintiff being an infant, brought an action by guardian; and after a verdict for him, it was moved in arrest of judgment, that there was no warrant for him to appear by guardian entered upon record. But the Court said judgment can never be arrested, but for that which appears upon the record itself; that this admittance ought not to appear upon this record.

* Amounting to a defect not amenable or aided by common law or by statute, and for which a writ of error would lie. As to the defects which are amenable or aided by common law and by statute; see *ante*, tit. Amendment, and *post*, tit. Pleading, and 1 Saund. 328.

By the statutes of jeofails, the following defects are aided or cured after a verdict: the want of an original writ, see 18 Eliz. c. 14; or bill upon the file, Hale, 130. 134. 264. 381. 304; variance in form only between the original writ or bill and the declaration, plaintiff, or demand, 21 Jac. 1. c. 13; want of form or pledges returned upon the original writ, or the omission of the sheriff's name in the return thereon, or want of pledges in any bill or declaration, 16 and 17 Car. 2. c. 8; want of a warrant of attorney for either party, see 18 Eliz. c. 14. 32 Hen. 8. c. 30; or appearance by attorney of an infant plaintiff, see 21 Jac. 1. c. 13; Barnes, 413; 1 Stra. 114; misleading, lack of colour, insufficient pleading or jeofail, or other default or negligence of the parties, their counsellors or attorneys, 32 Hen. 8. c. 30; want of form in any count, declaration, plaintiff, bill, suit, or demand, see 18 Eliz. c. 14; lack of averment of any life, so as the person be proved to be alive, see 21 Jac. 1. c. 13; want of any "profert," or the omission of "vi et armis," or "contra pacem," mistaking the Christian name or surname of either party, see 3 Wils. 40; sum, day, month, or year, in any bill, declaration, or pleading, being right in any writ, plaintiff, suit, or record, preceding, or in the same roll wherein the same is committed, to which the plaintiff might have demurred, and showed the same for cause; want of the averment of

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Hence, after judgment upon a demurrer a motion in arrest of judgment cannot be made, whether the demurrer were argued.

2. EDWARDS V. BLUNT. E. T. 1720. K. B. 1 Stra. 426.

Per Cur. After judgment on demurrer the defendant shall not come to arrest the judgment on return of the inquiry, for an exception that might have been taken on arguing the demurrer. The parties cannot be said to come as *amici curiæ*, nor shall any body tell us that the judgment we gave on mature deliberation is wrong; it is otherwise, indeed, in the case of judgment by default, for that is not given in so solemn a manner; or, if the fault arises on the writ of inquiry on verdict, for there the party could not allege it before.

3. CRESWELL V. PACKHAM. E. T. 1816. C. P. 6 Taunt. 650; S. C. 2 Marsh. 326. S. P. PRINCE V. NICHOLSON. T. T. 1814. C. P. 5 Taunt. 665; S. C. 1 Marsh. 401.

Or not

Application was made, on a former day in this term, to arrest the judgment on several grounds, the principal of which was, that the agreement on which the action was brought had been entered into between the defendant and eight other persons; whereas the action was brought by one only. The counsel showed cause against the rule, and made a previous objection that there had been judgment on demurrer, after which the defendant could not move to arrest the judgment, according to *Edwards v. Blunt*, *see* 2 Stra. 424.

"*hoc paratus est verificare*," or "*verificare per recordam*," or "*prout patet per recordam*;" or the want of a right venue, so as the cause were tried by a jury of the county where the action is laid, or any other matters of like nature, not being against the right of the matter of the suit, nor whereby the issue or trial are altered, *see* 16 & 17 Car. 2. c. 8; 7 T. R. 583; 2 East, 580; misjoining the issue, *see* 32 Hen. 8. c. 30; awarding the "*venire facias*," "*habeas corpora*," or "*distringas*," to a wrong officer upon insufficient suggestion; misawarding the "*viens*" out of more or fewer places than it ought to be (so as some one place be right named); misnomer of any of the jury (so as, upon examination it be proved to be the same man that was meant to be returned); want of return of the said writs (so as a panel of the names of the jurors be annexed to the writs), or omission of the sheriff's or other officer's name (so as it be proved that the writ was returned by the sheriff or other officer), *see* 21 Jac. 1. c. 13. If a "*venire*" be of the same action and between the same parties, all other faults in it are amendable, *see* Gilb. C. P. 174: but if, in ejectment, the "*venire*" be of a plea of trespass, omitting an ejectment of form, it is ill because not in the same action, *see* Cro. Jac. 528; but if the "*distringas*" had been right, the Court would have adjudged the "*venire*" to be null, and the want of it is aided *see* Cro. Jac. 175. Cro. Car. 275. 278. The 21 Jac. 1. c. 13. does not extend to the Christian name of the jurymen, and a mistake in that is incurable, *see* 5 Rep. 42; but the Court of Common Pleas refused to set aside a verdict because one of the jurors was named Henry in the "*venire*," "*habeas corpora*," and "*positas*," his name being Harry, *see* Barnes, 454; and the Court of King's Bench would not set aside the verdict where one of the jurymen had answered to his father's name, and served as his father, *see* 12 East, 229. However, there must be a panel returned; and if the sheriff return twenty-three on the "*venire*" and twenty-four on the "*habeas corpora*" or "*distringas*," and the twenty-fourth omitted on the "*venire*" appear and be sworn, the verdict will be void, *see* Cro. Car. 278; Bull N. P. 324. The statute 32 Hen. 8. c. 30. is confined to actions at common law; and in all the subsequent statutes of *jeofails*, there is a proviso that they shall not extend to criminal proceedings, *see* 4 Geo. 2. c. 26. A discontinuance is cured by the appearance of the party, in penal as well as other actions, *see* 6 T. R. 225; and the omission of a "*similiter*" is holden to be amendable, *see* Cowp. 407; 1 Stra. 551; 2 Wms. Saund. 319. By the 4 and 5 Anne, c. 16. s. 2. the statutes of *jeofails* are extended to judgments by default; so that all defects which are cured on a verdict by the statutes of *jeofails* at that day are helped on judgments by default; but not defects which are cured after a verdict by common law; nor, as it should seem, defects helped after a verdict by 5 Geo. 1. c. 13. where it is enacted that judgment after verdict shall not be stayed or reversed for any defect or fault, either in form or substance, in any bill, writ, original or judicial, or for any variance in such writs from the declaration or other proceedings. It becomes necessary, therefore, in order to ascertain the nature of the defects, which are aided after a judgment by default, since the statute of Anne, to distinguish accurately between such imperfections as are cured by verdict at common law and those which are remedied after verdict by the statutes of *jeofails* only. Where there was any defect, omission, or imperfection, though in form only, in collateral parts of the pleadings that were not in issue between the parties, so that there was no ground to presume that the defect or omission was supplied by proof, these defects were not cured by a verdict at common law; but they are as we have seen, aided by the statutes of *jeofails*, both after verdict and judgment by default; for it was an extremely hard case that a judgment given on merits should be stayed or reversed for defects in form or collateral matters.

Lord Chief Justice Gibbs. The doctrine of the case of *Edwards v. Blunt* was, that if the defendant can avail himself of the objection on demurrer, he shall not be permitted to do it on motion in arrest of judgment. The question, therefore, is, whether this objection might have been taken advantage of on demurrer; and I conceive that it might. The defendant is not deprived of his remedy by writ of error; and it is of greater consequence that the Court should abide by their rule, than that we should grant this motion. I know the defendant presents himself with the additional objection that the damages include the whole declaration generally; but still the objection springs from what might have been argued on demurrer; and I think it is convenient to adhere to our practice, because it obliges a party to take his objection in the first instance, and it prevents the Court from giving contradictory judgments on the same subjects, as if this might have been noticed on demurrer, and were it not, it would be rather inconsistent to give a judgment on this motion contradictory to what we gave on demurrer. The motion in arrest of judgment is not so regular a course of proceeding as a demurrer. The rest of the Court concurred.

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4. *THE CLERK OF THE TRUSTEES OF TAUNTON MARKET V. T. LIMBERLEY. M. T. 1776. K. B. 2 Bl. Rep. 1120.*

Indebitatus assumpsit for 10*l.*, for the use and occupation of certain pieces of ground, parcel of the market-place of Taunton, used and occupied by permission of the clerk, for selling divers wares and merchandizes therein, and for the use of divers stalls or standings in the same, *quantum meruit* for the like. Or made in respect to matters which might have been plead ed in abate ment;
On *non assumpsit* pleaded, and issue, there was a verdict for the plaintiff at the last assizes, with damages, 1*s.* It was moved for a new trial, because the action cannot be brought in the name of the clerk of the market, without naming him personally. 2ndly. It is brought for the use and occupation of a market-place, which cannot be by law; it should have been brought for toll; or pickage, or stallage. 3dly. There is no certain sum claimed or specified for that purpose. It was moved, by leave of the Court, in arrest of judgment on the same objection. The counsel added, that the *mesnomer* (if any) was pleadable in abatement, and therefore cannot be moved in arrest of judgment. And of that opinion was the Court; for by De Grey, C. J.—If this matter, which arises on the face of the record, be matter of abatement, and pleadable as such, it ought to be taken advantage of in the first instance, and not be moved in arrest of judgment; so in that case you are too late. If it is pleadable in bar you are too early, and should go to your writ of error.

5. *FREELAND V. HUNT. E. T. 1768. K. B. 2 Wils. 380.*

In covenant on a deed of assignment by the defendant of particular debts, and he covenants that none of those debts were satisfied. Judgment by default, and a writ of inquiry executed. A fatal mistake being now found out in the declaration, it was moved that the interlocutory judgment might be forthwith entered upon record, agreeable to the declaration delivered, and the roll be brought into the proper office, and that the defendant might have four days to move in arrest of judgment after the roll is brought in. Upon showing cause it appeared that the defendant attended the executing the writ of inquiry by counsel, and cross-examined the plaintiff's witnesses. Nor after defence made on a writ of inquiry.*

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Per Cur. We lament that entries on the roll are not, at the times when they ought to be, made. The rule must be discharged, because the defendant did not rely on the mistake, but has made a defence on the executing the writ of inquiry.

6. *MOZELEY V. DAVIES. T. T. 1822. Co. Ex. 11 Price, 162.*

On a question of parochial *modus* referred to a trial at law, testimony offered as evidence of reputation, in proof of the custom on which the right to the *modus decimandi* was founded, "that the money payments constituting the alleged *modus* had been uniformly made beyond living memory, and that the witness had heard old persons, who at that time occupied

When there has been a mistake trial on an issue directed by a court of equity, there can

* But it may be made after judgment by default, or after judgment *quod capiat*; see 1 *Lit. Rep.* 469; 1 *Str.* 425.

be no motion in arrest of judgment, such motion being incompatible with the nature and object of the trial of issues in aid of such court.*

The omission of a matter of substance in a declaration will not authorize a motion in arrest of judgment, where the plaintiff could not have obtained a verdict without proving the fact which ought to have been alleged.

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But this rule does not extend to cases where the plaintiff totally omits to state his title or cause of action.

lands in the parish, and were long since dead, say, that it had always been the custom to make such payments," was held to be admissible evidence of reputation on that subject, against an objection taken of interest in making such a declaration, on the part of the deceased persons on whose information the evidence was founded. When moved on an issue directed by the court of equity, there can be no motion in arrest of judgment, such a motion being incompatible with the nature and object of the trial of issues in aid of a court of equity.

7. *HITCHIN v. STEVENS*. M. T. 1681. K. B. 2 Show. 235; S. C.

T. Raym. 487.

Bargainee of a reversion brings debt for rent, and alleges no attornment; *nil debet* pleaded, and a verdict for the plaintiff.

It was moved in arrest of judgment, because the plaintiff has not set forth notice to the rent, as he has none without attornment; there were cited the cases of *King v. Somerland*, Latch. 14; and *Pope v. Skinner*, in Hob. 72; Roll. 489; S. C. 1 Danv. Abr. 610; 3 Keb. 354; 2 Salk. 662; Lill. Ent. 55; Cowp. 825; 1 Term. Rep. 141. 145. But a rule was taken and agreed to by all the Court, that in any case where any thing is omitted in a declaration, though it be matter of substance, if it be such as, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for plaintiff, that such omission shall not arrest the judgment. And upon this, after solemn debate in Hilary term following, judgment was given for the plaintiff.

8. *RUSHTON v. ASPINALL*. T. T. 1871. K. B. 2 Doug. 679.

It was an action of *assumpsit*. The first count in the declaration, after stating a bill of exchange drawn by one Billinge on one Meyer, dated the 27th of November, 1778, and payable to one Jones or order three months after date, that Jones had indorsed it to Rushton, and Rushton to Aspinall, proceeded as follows:—"Which said bill of exchange, so made, subscribed, and indorsed as aforesaid, afterwards, to wit, on the same day, and day aforesaid (*viz.* the day of the date of the bill), at Manchester aforesaid, was shown and presented to the said Peter Meyer, for his acceptance thereof, and the said Peter Meyer, according to the usage and custom of merchants aforesaid, did then and there accept the same, and promise to pay the said sum of 22*l.* 10*s.* therein mentioned, according to the tenor and effect of the said bill of exchange, and the indorsements thereupon so made as aforesaid; yet the said Peter Meyer, although afterwards, to wit, the same day and year aforesaid, at Manchester aforesaid, was requested to pay the said sum of money in the said bill specified, according to the tenor and effect thereof, and of his acceptance thereof so made as aforesaid, altogether neglected and refused, and still doth neglect and refuse to pay the same; of all which premises the said John Jones, Geo. Billinge, and Peter Meyer, respectively, the same day and year aforesaid, at Manchester aforesaid, in the county aforesaid, had notice, and by reason thereof, and according to the said usage and custom of merchants, the said Thomas Rushton became liable to pay the said Joseph Aspinall the said sum of money, in the said bill of exchange contained, according to the tenor and effect thereof, and of the several endorsements so made thereon as aforesaid; and being so liable, the said Thomas afterwards, to wit, the same day and year last mentioned, at Manchester aforesaid, in the county aforesaid, in consideration thereof, undertook and to the said plaintiff then and there faithfully promised to pay to him the said sum of money in said bill of exchange contained, according to the tenor and effect thereof, and according to the several indorsements made thereon as aforesaid." There was a general verdict for the plaintiff, and judgment being entered, the record was moved into this court, and the plaintiff in error assigned several errors on the different counts.

Lord Mansfield. The two objections insisted upon are, 1st. That the declaration does not allege a demand on the acceptor. 2ndly. It does not state notice to the defendant of the acceptor's refusal to pay. The answer was, that

* Matters of fact not appearing on the record cannot be called in aid in opposition to a motion in arrest of judgment, made on objections apparent on the face of the record; see *Rex v. Rowbottom*, 5 Price, 447.

after verdict, it must be presumed that those facts were proved at the trial, and our wishes strongly inclined us to support the judgment, if we could. But on looking into the cases, we find the rule to be, that, where the plaintiff has stated his title or ground of action defectively or inaccurately (because, to entitle him to recover, all circumstances necessary in form or substance to complete the title, so imperfectly stated, must be proved at the trial), it is a fair presumption after a verdict that they were proved; but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption. The case cited from Shower comes within this distinction; for the grant of the reversion was stated, which could not have taken effect without an attornment, and therefore that being a necessary ceremony, it was presumed to have been proved. But in the present case, it was not requisite for the plaintiff to prove either the demand on the acceptor, or the notice to the defendant, because they are neither laid in the declaration, nor are they circumstances necessary to any of the facts charged. If they were presumed to have been proved, no proof at the trial can make good a declaration, which contains no ground of action on the face of it. The promise alleged to have been made by the defendant, as an inference of law and the declaration, does not contain premises from which such an inference can be drawn. I see in a note of a case in this court, in Easter term, 18 Geo. 3. I am stated to have said, "a verdict will not mend the matter where the gist of the case is not laid in the declaration; but it will cure ambiguity;" and there is a strong case in point of an action for keeping a malicious bull, where the *scintilla* having been omitted in the declaration, it was held bad after verdict. Therefore we are all of opinion that there should be judgment for the plaintiff in error.

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2. *CROUTHER v. OLDFIELD*. H. T. 1705. K. B. 1 Salk. 365; S. C. 2 Ld. Raym. 1225. S. P. *WICKER v. NORRIS*. T. T. 1735. K. B. Ca. Temp. Hard. 116; 2 Stra. 1011; S. C. 1 Burr. 301; 2 Burr. 1159; 3 Wils. 275. *STANTON v. BEADLE*. M. T. 1791. K. B. 4 T. R. 472.

Copyhold estate laid, without saying *ad voluntatem domini*. Upon motion judgment was arrested; but the Court held, that now after verdict this estate of the plaintiff must be taken to be a copyhold estate, and not a freehold estate, because it is both laid and found that the tenements were parcel of the manor, and that by custom the plaintiff, *ut tenens customar'*, has common; all which is utterly impossible, unless the tenement was copyhold, and therefore must be supposed such, though the words *ad voluntatem domini* were omitted, comparing it to the case in 1 Sid. 218. of debt for rent by an assignee of a reversion, who shows no attornment, and has a verdict. Upon this the whole Court held, that, though a title which could not be good could never be aided by a verdict yet a title in a declaration which was only imperfectly set forth, and where the want of somewhat omitted might be supplied by intendment, was cured by verdict.

Hence, it is an established principle, that a verdict will aid a title set out, but not a defective title.*

Thus, when the grant of a reversion was stated, which could not take effect without attornment, it was held on that proof of that ceremony might be presumed.

9. *RUSHTON v. ASPINALL*. T. T. 1781. K. B. 2 Doug. 683.

In an action of debt for rent, by the bargainee of a reversion after a verdict for the plaintiff, it was objected, in arrest of judgment, that the plaintiff had not alleged attornment, without which (as the law then stood) he could have no title; but a rule was taken, and agreed by all the Court, that in any case where any thing is omitted in the declaration, though it be matter of substance, if it be such as without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment; and thereupon, after solemn deliberation, judgment was given for the plaintiff.

10. *SPIERES v. PARKER*. H. T. 1786. K. B. 1 T. R. 145.

Per Cur. Nothing is to be presumed but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated.—

* Or, as Mr. Justice Buller in 1 T. R. 145. explained the rule, "nothing is to be presumed after verdict but what is expressly stated on the declarations, or necessarily implied from the facts which are stated;" see 7 T. R. 521; 1 Saund. 228.

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conveyed by deed is pleaded, but is not alleged to have been by deed, yet that proof will be inferred.

That is the case where a feoffment is pleaded without livery; a livery is always implied, because it makes a necessary part of a feoffment. We know of no decision against this rule. There is indeed a *dictum*, in a case which came before Lord Hardwicke in this court, which militates against it. That was an action to recover an americiament in an inferior court, and the declaration did not state that the defendant was a resiant. There the court held, that residence must be presumed to have been proved at the trial, otherwise the jury could not have found that there had been any debt at all; but there was a more solid ground for that decision in the subsequent part of the case.

11. COLLINS V. GIBBS. M. T. 1759. K. B. 2 Burr. 899.

So, where a promise depends on the performance of something to be first done by him to whom the promise is made, but no averment of performance is introduced in the declaration.

On motion in arrest of judgment, after a judgment by default, and writ of inquiry executed, in an action upon the case on *assumpsit*. The objection was the want of an averment of performance of what the plaintiff insisted to be a condition precedent. It was an action upon the case wherein the plaintiff, having first recited the dependancy of a former action brought by the defendant against him, and a compromise thereof upon an agreement for the payment of the costs of it by the present defendant to the present plaintiff, on the now plaintiff's giving him a general release, lays the defendant's promise to pay him his demand in the present action to have been made, "in consideration that the said William (the now plaintiff), at the special instance and request of the said John (the now defendant), would execute to the said John a general release, to bear date on the 27th day of July, in the year aforesaid" (which was the day before the agreement); "and to be filled up in the common and usual form of general releases; he the said John (the present defendant) undertook and faithfully promised the said William (the present plaintiff) to pay him all the costs and expenses that he, the said William, had been at, in defending the said suit, seeing counsel subpoenaing witnesses, jounries, and all other charges and demands in the said suit whatsoever, as soon as a bill of such costs could be prepared and produced to him the said John." Then the plaintiff avers his costs and expenses in the said suit to have been 21l. 3s. 7d., and that a bill of such costs and expenses was prepared, and produced to the defendant, whereof he had notice. But the said defendant, &c. &c.

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Lord Mansfield now delivered the resolution of the Court. This is a motion made by the defendant in arrest of judgment by default; so that it comes before the court exactly as if it had been upon demurrer, and is not like the cases of objections to judgments after verdict. The plaintiff has not averred performance of what was to be done on his part, nor shown that he was ready to perform it. Therefore we are all of opinion that it cannot be made good as laid in the declaration; and the true distinction as to supplying such defects, is, whether the objection be made after the verdict or not. Therefore the judgment must be arrested. Whereupon the counsel moved to amend, upon payment of costs, by inserting such averment, as he said. the fact really was; which was opposed as being too late after judgment was arrested, and as having never been done.

12. SKINNER V. LEASON. H. T. 1670. K. B. 1 Saund. 228. a.

So, in an action for a malicious prosecution it is necessary to allege in the declaration that the prosecution is at an end; the want of such an averment is cured after verdict.

Action for a tort. The plaintiff declares that the defendants on the 3rd day of March, in the 20th year of the reign of our Lord the now King, at London, to wit, in the parish of St. Mary-le-bow, in the ward of Cheap, by conspiracy between them, there first thereof had to aggrieve and impoverish the said plaintiff and to cause the said plaintiff to be arrested at the suit of the said William Gunton (one of the defendants), and to deter the friends and neighbors of the said plaintiff from becoming bail for the said plaintiff, to the intent that the said plaintiff should be detained in prison for want of bail, and so without any just cause to lose and be deprived of his liberty; without any just cause levied and affirmed in the name of the said William (namely, the said Gunton one of

* But where, in an action against the indorser of a bill of exchange, the plaintiff did not allege demand or a refusal by the acceptor when the bill became due, or that the defendant had notice of the acceptor's refusal, the omission was held not to be cured by verdict: see Doug. 679.

the defendants), a certain plaint of a plea of trespass upon the case, to the damage of the said William of 300*l.* against him the said plaintiff, at the suit of the said William, in the court of record holden before Sir Dennis Gordon, Knight, then one of the sheriffs of the city of London, in his compter, according to the custom from the time whereof the memory of man is not to the contrary used in the same city; and him the said plaintiff, by virtue of the said plaint, caused and procured to be arrested and imprisoned, and to be detained in prison for the space of twenty days and nights; whereas, in fact, the said defendant Gunton, at the time of levying and affirming the said plaint against him the said plaintiff had not any just cause of action against him the said plaintiff, to the plaintiff's damages of 200*l.*, and thereupon he brought his action; to which all the defendants pleaded not guilty, and the jury found the defendant Gunton guilty, and assessed the damages at 10*l.* and costs, and the other two defendants were acquitted; and in last Hilary term, upon the motion for the defendant, the judgment was stayed until this term. On motion in arrest of judgment, two exceptions were taken. 1. That there was no venue laid where the plaint was levied, or the plaintiff taken by virtue thereof. 2. That it was not alleged by the plaintiff in his declaration, that the plaint levied in the compter was determined either by nonsuit or discontinuance, or verdict against the plaintiff there; for otherwise the plaintiff hath commenced his action too soon.—The Court refused to arrest the judgment

13. *BUTT v. HOWARD*. T. T. 1821. K. B. 4 B. & A. 655.

A declaration in debt for tithes, under 2 and 3 Ed. 6. c. 13. s. 1. omitted to state that the tithes had been yielded and paid, and of right ought to have been paid, within forty years next before the passing of the act. On a rule nisi for arresting the judgment on the ground that it contained no averment, that the tithes had been yielded and paid, and of right ought to have been set out and paid in kind to the farmer or proprietor thereof, within forty years next before the passing of the statute of 2 and 3 Ed. 6. c. 13. s. 1. the Court said the judgment must be arrested, upon the ground that the allegation omitted in the declaration is one required by law to be made. The uniform course of the precedents has been to insert it, and, on various occasions, it has been considered by the judges as a necessary averment. But it is said, that the objection if any, is cured by verdict. We are, however, of a different opinion, for all the facts necessary to bring the case within the power of the clause must be stated. In an action on the game laws, it is necessary to allege that the party charged with having a dog, &c. was not qualified to use it; and in *Spieres v. Parker*, see 1 T. R. 145. it is laid down by the Court, that even after a verdict such omission is fatal. But it is said that it is averred here, that the defendant carried away the tithe contrary to the form of the statute, and that that allegation is sufficient. We think that it is not so. The Court are to judge whether the facts are contrary to the statute, and it is not to be taken after verdict, that facts are proved, which not being stated in the declaration could not be necessary to prove at the trial. The count, therefore, ought to have contained this allegation, and not containing it, the judgment must be arrested.

14. *KIGHTLY v. BIRCH*. E. T. 1814. K. B. 2 M. & S. 533.

Action against the sheriff for a false return, the first six counts being in *tort*, and the four last in *assumpsit*; and there was a verdict for the plaintiff on the six first counts, and for the defendant on the four last. Whereupon it was moved in arrest of judgment that here was a misjoinder, and a rule nisi was granted; the case of *Baye v. Bromick*, 3 Lev. 99. was relied on, where trover and found for *assumpsit* were joined, and upon *non culp'* a verdict for the defendant proved the trover, and for the plaintiff proved the *assumpsit*; and it was resolved by the Court, that the counts were well joined, and that the judgment should stand.

* Nor after verdict will surplusage be considered as vitiating the proceedings, Co. Lit. 203; Plowd. 232; 1 Saund. 169; 287; and therefore, in trover, if the plaintiff declare "that on the 3rd of March he was possessed of goods, which came to the defendant's hands, and that afterwards, to wit, on the 1st of March he converted them to his own use," this is barred after verdict: for that he "afterwards converted them" is sufficient and the scilicet is void; *Gre. Jac.* 438.

the misjoinder is not a cause for arresting the judgment.

So, when there is a misjoinder of counts,

[677] one of them being partly in case and partly in trespass, and another entirely in trespass, and no evidence was given as to the acts of trespass, the verdict, if taken generally, may be a mended according to the evidence by the judge's notes.*

The motion in arrest of judgment may be made in the K. B. at any time before judgment is given; though a new trial has been previously moved for.

the whole Court that these two could not be joined, and though the jury had severed them, yet the declaration being ill *ab initio*, the plaintiff ought not to have judgment, and so judgment passed, *quod nil capiat per billam*. But the Court discharged the rule, Lord Ellenborough, C. J., saying, that the case referred to had had its day, and that it was time it should cease.

15. *BRILL V. NEEL*. M. T. 1819. K. B. 1 Chit. Rep. 695.

A general verdict was obtained for the plaintiff, and general damages assessed. It was now moved for a rule to arrest the judgment, or else to set aside the verdict and have a new trial. The first count was partly in case and partly in trespass. The second count was entirely in trespass. The declaration stated in the first count, that the defendant wrongfully raised the road with earth, and this grievance was in case, but the count proceeded to state that the defendant wrongfully placed and laid earth on the hedge, and concluded that by reason thereof cattle strayed into the plaintiff's close. The second count was entirely in trespass, for choking up the hedges.

Abbott, J. The second count is clearly framed in trespass. However, no evidence seems to have been given on this count, and then the plaintiff could prevent you from deriving any benefit from this motion by amending the verdict, and confining it to that part of the declaration on which evidence was given. The judge who tried the cause directed the jury not to consider the trespass. You are at liberty to take a rule to arrest the judgment if you think fit, but it will only produce a contrary motion on the part of the plaintiff, who, remitting the damages on the second count, will be entitled to the verdict and damages on that part of the declaration on which alone any evidence was given.

(B) MOTION AND RULE FOR IN.

(a) *In K. B. and C. P.*

1. *REX V. HAYES*. T. T. 1761. K. B. 2 Stra. 845. *REX V. KEENS*. H. T. 1786. 2 Tidd. 960. K. B. *REX V. HOLT*. M. T. 1793. K. B. 5 T. R. 445.

Judgment not having been signed, the Court was of opinion the defendant might move any thing in arrest of judgment.

2. *TAYLOR V. WHITEHEAD*. T. T. 1781. K. B. Doug. 745.

Trespass for beaking and entering the close of the plaintiff, at the parish of Otley, in Yorkshire. The defendant pleaded: 1st. The general issue. 2nd. A right of way by prescription, through a lane of the plaintiff's, contiguous to the *locus in quo* to Otley bridge, or the river Wharfe; that the tenants and occupiers of the *locus in quo* were, from time whereof, &c. by reason of their tenure, bound to repair the lane, and the banks thereof next to the river; that at the several times when, &c. the lane was out of repair and overflowed with water, so that the defendant could not use the way, without imminent danger of the loss of his life, and goods; and that he necessarily went into, through, and over the *locus in quo*, as near to his said way as he possibly could as it was lawful for him to do for the cause aforesaid. 3rd. The *locus*, &c. lay contiguous to a lane of the plaintiff's, and that the said lane was adjoining to the river Wharfe; that the defendant had a right of way by prescription thereof and over the lane; and that, because the lane and way were overflowed with water from the said river, so much that the defendant could not at the several times, &c. pass or repass, he did necessarily go out of the said way, as near to the said way as he possibly could, into, through, and over, &c. A rule was obtained to show cause why the plaintiff should not be at liberty to enter up judgment on that issue, as well as the others, notwithstanding the finding of the jury, on the ground, that in point of law, although the defendant had the right of way through the plaintiff's close, he was not entitled to go upon the adjoining land of the plaintiff when it was out of repair. Cause was shown against this rule, and it was objected that it had been applied for too late; for it was in the nature of a motion in arrest of judgment; the counsel also said he had always understood the practice to be that such a motion could not be made

* If the record be right, a motion in arrest of judgment cannot be founded upon an apparent error in the copy of the declaration delivered to the defendant; see 6 Tass. 385.

after a new trial had been moved for, unless the Court upon granting the rule for a new trial should have given leave, if that should be discharged, to follow it by a motion in the arrest of judgment. It seemed, he said very unreasonable, that a party should be permitted to avail himself in so late a stage of the cause, of an objection that might have been taken in the first instance by a demurrer to the plea, by which mode of proceeding, if the objection was founded in law, all the expense and vexation of the trial, and the motion to set aside the verdict would have been avoided. After some consideration and conference with the master, the Court declared their opinion that the motion in arrest of judgment may be made at any time before the judgment is entered up; and that the present motion being of the same nature was not too late.

3. *WOOD V. SHEPARD*. T. T. 1795. K. B. 1 Salk. 78; S. C. 6 Mod. 24.

NEWBALL V. ADAMS. M. T. 1817. C. P. 8 Taunt. 335.

It is against the ancient course of the Court to make a rule to stay judgment, unless the *postea* be brought in; but the Court, if there be probable cause shown, will order the *postea* to be brought in.

Per Cur. If one moves in arrest of judgment, he ought to give notice to the clerk in court of the other side; but the better way is to give a rule upon the *postea* for bringing it into court, for that is a notice itself.

See 5 T. R. 454; 8 East, 28; 2 Wils. 380.

4. *LYTE V. RIVERS*. T. T. 1756. C. P. 6 Barnes, 445.

It was for defendant offered to move in arrest of judgment, July 5; but,

Per Cur. The motion comes too late. Writ of *habeas corpus* *jur.* was returnable 15 Trin. and the motion in arrest of judgment ought to be made before or upon the appearance day of that return, which was July 4.

5. *CAMP V. GALE*. T. T. 1733. C. P. Barnes, 247. *SHINGLER V. ROBERTS*.

E. T. 1738. C. P. Ca. Prac. 106.

Defendant moved in arrest of judgment the last day of the term, but had no affidavit of notice of the motion. The Court made the common rule to stay the entry of final judgment till cause shown, but declared, that for the future they would never make a rule to stay upon a motion in arrest of judgment the last day of a term without notice.

(B) IN EXCEQUER.

LOW V. CROCKETT. T. T. 1819 C. Ex. Prac. 566; *sed vide* Mang. Ex. P. 353.

In an action against a sheriff for removing goods seized under a *fiat facias* without paying the landlord a year's rent, under the 8th of Anne, wherein the plaintiff recovered a verdict, the Court refused a new trial on the ground of the want of an allegation in the declaration, that the sheriff had notice of rent due, but should be moved in arrest of judgment. The Court will not permit a motion to be made in arrest of judgment after the expiration of the first four days of the term next after the trial of the cause, and a rule nisi for a new trial has been disposed of. The motion should be made in the alternative in the first instance.

(C) COSTS IN.†

IX. RELATIVE TO JUDGMENTS EX OFFICIO.‡

XI. RELATIVE TO THE RELATIONS OF.

(A) IN GENERAL.

* In support of the motion the roll should be brought into Court, if it be entered on record; if not, the record of *Nisi Prius* should be produced by the associate.

† If judgment be arrested, each party pays his own costs; except, perhaps, where an action is brought by a common informer, in which case it would seem, under the stat 27 Eliz. c. 10. the defendant, on succeeding in such a motion, would be entitled to costs; see Gilb. C. P. 271; Hall on Costs, 263.

‡ 4. If upon the whole record it appear that the plaintiff has no right to sue, whether from a permanent disability or otherwise, the Court are bound, ex officio, to give judgment against him.

The *postea* must be brought in to court.

In the C. P. the motion must be made before or on the appearance day of the return of the *corpus jurato* rum.

And it can not be made with out notice on the last day of term.*

In the Ex. the cheque the motion in arrest of judgment must be made with in the first four days of the next term after the trial, and it can not be made after an unsuccessful motion for a new trial.

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The judgment by indentment of law, has relation to the first day of the term, as if it was given on that very day, unless there is a memorandum to the contrary, as where there is a continuance of the cause till another day in is entered, the same term.

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Unless any thing appear on the record showing that it can not have that relation;*

2. SWANN v. BROOME. M. T. 1704. K. B. 3 Burr. 1596.

This case came before the Court upon a writ of error from the Court of Common Pleas, upon a common recovery suffered there. By consent, the error assigned was this: that the day of the return of the writ of summons was on Sunday, the 13th day of May, 1750, on which said 13th day of May, Edward Swan the younger, tenant-in-tail male, and vouchee in the common recovery, died without issue male of his body. The case was elaborately argued. The Court from the beginning showed a strong inclination to support the recovery if possible. The question to be determined was, whether the judgment could relate to the essoign day of the term, or to any day prior to the 13th of May, the essoign-day of the term:

Lord Mansfield was of opinion that a judgment relates to the essoign-day of the term, unless any thing appears on the record to the contrary, showing that the judgment cannot have that relation. If the tenant-in-tail was alive when the judgment was given, or may be supposed to have been given, such judgment is good; if not, then it is a bad judgment, because given after the death of the tenant-in-tail. Where it appears upon the face of the record that the relation could not be on the essoign-day of the term, but to a subsequent day, the presumption of such relation must cease, because it cannot possibly be supposed or intended that it was given that day, when it appears upon the face of the record impossible that it could be so. Where any such matter is apparent upon the face of the record, the judgment then relates only so far back as it may consistently with the record be intended or supposed to relate.

3. TURNER v. DAVIES. T. T. 1769. K. B. 2 Wms. Saund. 148. SOLOMONS v. NISSEN. M. T. 1788. K. B. 2 T. R. 676.

Per Cur. In actions by original the judgment relates to the essoign-day of the term.

4. OADES v. WOODWARD, H. T. 1702. K. B. 1 Salk. 87; 3 Id. 116. HEARY v. PARRIS. T. T. 1795. K. B. 6 T. R. 368.

Woodward gave a warrant of attorney to confess a judgment, and died within a year after the time of vacation, before the essoign-day of the subsequent term, which was Easter term. The attorney after his death entered up the judgment as of the preceding term, but brought not the roll in before the essoign-day of Easter term; and it was now moved to have the judgment set aside, the warrant being revoked by the death of the party.

Per Holt, C. J. By the course of the Court a warrant of attorney to confess a judgment is not revokable, and the Court will give leave to enter up the judgment, though the party does revoke it; but it is determinable by the party's death; but if the party dies in the vacation, the attorney may enter up the judgment that vacation as of the preceding term; and it is a judgment at the common law.

5. MAYOR v. BERRY. H. T. 1769. K. B. 4 Burr. 2277.

The judgment in this case was pronounced in Trinity term, 1767. The defendant died in October, 1767. A rule had been obtained for the plaintiff to show cause why the judgment should not be entered up as for Trinity term;

* And if it be signed in vacation, it relates to the first day of the preceding term; Willles, 427, 428.

† We have seen (*ante*, vol. i. tit. Abatement) that the death of a plaintiff or defendant before final judgment abated the suit, so that the judgment could not be entered as of a day after the death; but by the stat. 17 Car. 2 c. 8. the death shall not be alledged for error, provided the judgment be entered within two terms after verdict.

Add in actions by original, the judgment relates to the essoign day of the term. Hence, if either party die after a special verdict, and pending the time taken for argument or admission thereon, or on a motion in arrest of judgment, or for a new trial, judgment may be entered at common law.† After his death, as of the term in which

1767, the time when it was pronounced; see 6 Mod. 59, 60; Lord Mohurr's the *postea* case; and the same book, 191, Hodges v. Templer. Mr Wallace was for the plaintiff, and opposed the rule. But the Court thought it a very reasonable one, and Lord Mansfield mentioned the case of Tooker v. Duke of Beaufort, 1 Burr. 147. See 1 Leon. 187.

6. MARA V. QUIN. M. T. 1794. K. B. 6 T. R. 11.

The counsel produced an affidavit, on behalf of the defendant, in which it was stated that she should be damnified if the rule were to stand as pronounced by the Court, for that other creditors on simple contracts had obtained judgments against her in the interval between Michaelmas term, 1791, and Michaelmas term 1793, and that in fact she had paid more than she had received in the character of executrix. It was observed that the plaintiff's action was on a bond, and that after notice of this specialty, the executrix ought not to have paid any debts of an inferior nature. But the Court said, that as the plaintiff applied to the Court for a favour, in desiring that the judgment in the former action might be entered up as of a term prior to that when in strictness he was entitled to enter it, they ought only to grant that favour on condition that the executrix was not prejudiced by it; and that the executrix ought, under these circumstances, to be allowed all debts that she might fairly have paid in the interval, whether those debts were or were not of an inferior nature. On which both parties agreed to refer the account to the master, subject to the direction before given by the Court.

7. FLOWER V. COMIT BOLINGBROKE. M. T. 1725. K. B. 1 Stra. 639. FLOWER V. WHADCOCK. E. T. 1740. C. P. Barnes, 262. BATES V. LOKWOOD. H. T. 1787. K. B. 1 T. R. 637.

About twenty years since the plaintiff obtained judgment against the then Earl of Bolingbroke, but by the carelessness of his attorney, it was never entered, though he had charged the plaintiff for doing it, and had been paid his bill. The attorney being dead, whereby the plaintiff had lost his remedy against him, and there being a decree in Chancery for the payment of these debts in a course of administration, the plaintiff, to have a preference before other creditors moved the Court for leave to enter up the judgment, *nunc pro tunc*; but upon consideration, the Court refused to do it (though by not being docketted, it could not effect purchasers), it being such a distance of time, that the presumption was, that the debt was satisfied.

8. ERBY V. ERBY. T. T. 1714. K. B. 1 Salk. 80.

In this case it was objected, that bringing debt upon a judgment was a waiver of the lien created by that judgment. But the Court held, that bringing debt upon a judgment did not postpone this to other judgments, and that it was the act of the attorney, and that it would be no waiver, because there was no other remedy after the year and day at common law.

(B) WITH REFERENCE TO THE DEFENDANT AND HIS HEIRS.

And see *ante*, tit. Heir, Devise.

(a) As to lands†.

JEFFERSON V. MORTON. H. T. 1793. K. B. 2 Saund. 7.

Per Cur. The writ whether on a judgment recovered against an ancestor, or recognizance acknowledged by him, which is in the nature of a judgment, may also be brought against the heir, who is not the tenant of the lands; the plaintiff, however, cannot have execution against the heir, of any more than a moiety of the lands which were his ancestor's at the time of the judgment, or

* And in granting the indulgence, they will take care that it shall not operate to the prejudice of the defendant, partners, or mortgagees; 6 T. R. 11.

† As against the defendant and his heirs the judgment finds a moiety of all the freehold lands and tenements, which he or any person in trust for him, 29. Ca. 2. c. 8. s. 10; were seized at or after the time to which the judgment relates. Where there is a term attendant on the inheritance, a judgment being a lien on the inheritance, affects the term also; 2 Yern. 526. But generally a judgment does not bind leasehold property, which is affected only by the writ of execution; see Godb. 161; 8 Rep. 171; and as against purchasers only, by the delivery of it to the sheriff; 29 Car. 2. c. 8. s. 16. Copyholds are altogether exempt from the effects of a judgment; see 1 Roll. Abr. 888.

had of these, the party alien *bona fide* before execution sued out.*
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the recognizance, or after. For it is held that the heir is chargeable antecedent of the lands, and not as heir; and that an action of debt does not lie against him on the judgment or recognizance, as it does on the bond of his ancestor, but a *scire facias* only to have execution of an ancestor's land in his hands.

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The clause in the statute 29 Car. 2. cited *infra*, is confined to purchasers, and does not apply as between the parties to the suit; hence, if defendant die in vacation, judgment may still be entered after his death, or of the preceding term when he was living; and it will be a good judgment as at common law of that term;†

But then the rule ought to be brought in and filed

See 3 Rep. 12, Sir W. Herbert's case; Dy. 271. a. Pl. 25; Sir W. Jones, 87, 88, Bowyer v. Rivett; S. C. 3 Bulst. 317; Pakn. 419; Poph. 153.

(C) WITH REFERENCE TO PURCHASERS.

1. OADES v. WOODWARD. H. T. 1702. K. B. 1 Salk. 87; 3 Salk. 116. PARSONS v. GILL. T. T. 1700. K. B. 1 Ld. Raym. 695; ODES v. WOODWARD. E. T. 1702. 2 Ld. Raym. 766. DUKE OF NORFOLK'S CASE. 1 Salk. 401; S. C. 7 Mod. 39.

Defendant gave a warrant of attorney to confess judgment, and died within a year after, in time of vacation, before the *essoign-day* of the subsequent term, which was Easter term; the attorney after his death entered up the judgment as of the precedent term, but brought not the roll in before the *essoign-day* of Easter term. And it was now moved to have the judgment set aside, the warrant of attorney being revoked by the death of the party.

Per Holt, C. J. By the course of the Court a warrant of attorney to confess a judgment revokable, and the Court will give leave to enter up the judgment though the party does revoke it; but it is determinable by the party's death; but if the party dies in the vacation, the attorney may enter up judgment that vacation as of the preceding term; and it is a judgment at common law.

or of the preceding term when he was living; and it will be a good judgment as at common law of that term;†

2. OAKES v. WOODWARD. H. T. 1702. K. B. 1 Salk. 87; 2 Ld. Raym. 850; S. C. 6 Mod. 191.

Per Holt, C. J. Judgment being a judgment at common law, as of Hilary term, it was a judgment entered when the party was alive, and therefore good

* Therefore, if a man has judgment for a debt, and the debtor, before execution made, aliened by fine, and five years pass, yet the plaintiff may still sue out execution. But if one article to buy an estate, and pay the purchase-money, and afterwards a judgment is recovered against the vendor by a third person, who had no notice, yet this judgment shall not in equity effect the estate; because from the time of the articles, and payment of the money, the vendor was only a trustee for the purchaser. In such case, however, it must be understood, that the consideration paid is somewhat adequate to the thing purchased; for if the money be but a small sum, in respect of the value of the land, this shall not prevail over a meane judgment, creditor, who is mortgagee; for a valuable consideration, and without notice, shall take place of the intended purchaser; for in this case the money is lent upon the title and credit of the estate, and attaches upon the land; but it is not so in the case of a judgment creditor, who (for aught that appears) might have taken out execution against the person or goods of the party that gave the judgment; and a judgment is only a general security, not a specific lien upon the land. If A. and B. recover several judgments against C., and A. sue out an *elegit*, and have a moiety of C.'s lands delivered to him, and then B. sue out an *elegit*, the sheriff it seems can only extend a moiety of the remaining lands. But if A. have two judgments against C., and in the same terms take out two *elegits* on the one, he may have a moiety of the whole, and on the other the other moiety, and is not restrained on the latter to a moiety of the money: for in judgment of law, the whole term is but as one day on lending money; therefore, if the lender take two several bonds and warrants of attorney, one for a part the other for the residue of the money, and enter up two several judgments thereon of the same term, he may take the whole of the defendants funds upon them.

† By a fiction of law we have seen all judgments were supposed to be judgments of the first day of the term in which they were obtained; and therefore a purchaser might have his estate incumbered by a judgment acknowledged subsequently to his purchase. To obviate this injustice, it was enacted (see 29 Car. 11. c. 8 s. 14, 15.) that any judge or officer of any of his Majesty's courts of Westminster should, at the signing of the same, set down the day of the month and the year of his so doing, upon the paper book, docket, or record, which he should sign, which day of the month and year should also be entered on the margin of the roll of the record where the said judgment should be entered and such judgments, as against purchasers *bona fide* for valuable consideration of lands, tenements, or hereditaments to be charged thereby, should, in consideration of the law, be judgments only from such time as they should be so signed, and should not relate to the first day of term whereof they were entered, or the day of the term whereof they were entered, or the day of the return of the original, or filing bill.

without all question, if the roll had been brought in before the essoign-day of before the Easter term; but that not being done, the question will be, whether we can admit it to be filed? By the course of the Court, all the rolls of Hilary term ought to be brought in before the essoign-day of Easter term, and made part of the bundle of Hilary term; and it is for this reason that what is done in the vacation is looked upon as an act of the term preceding; and there cannot be a *post terminum* roll received without leave upon motion, which the Court does not grant but when it appears that nobody can be prejudiced, for it is dangerous; and he said that practice should never have his consent to be allowed again.

3. *HODGES v. TEMPLER*. T. T. 1704. K. B. 6 Mod. 191.

Rule was for judgment in Hilary term was twelve months; but costs not being taxed, the plaintiff, out of kindness to the defendant, gave time for settling the costs until Easter term, and before costs settled and judgment entered plaintiff died. The last Hilary term, the attorney entered up his judgment as of Hilary term before, viz. the time that the rule was pronounced. And, now upon motion, it was set aside for irregularity; and the Court directed the parties, if they pleased, to enter it as of Hilary term last, being the term that they really had entered it, and enter their continuance till then, for the Court could not take notice of the plaintiff's death. Holt, C. J. If one will enter a judgment as of a term, he must actually enter it before the essoign-day of the succeeding term, otherwise it shall only relate to the term of which he enters it; and if judgment be signed in Hilary term, and in the subsequent vacation the defendant sells lands, and before the essoign-day of the next term, the plaintiff enters his judgment, it shall affect the lands in the hands of the purchaser; and if one enter judgment so in vacation, where, indeed, the party was dead, if he was living in the precedent term, the judgment is good by relation.

* Although a judgment is not duly docketed, and therefore void, against a purchaser, yet if the purchaser has notice of it, and did not pay the value of the estate, it will be presumed that he agreed to pay off the judgment, and equity will compel him to pay. The general rule of equity would warrant an assertion, that the case would be the same, although no agreement were made. In the case of *Forshall v. Coles*. 7 Vin. Abr. 54 pl. 6; 2 Eq. Ca. Abr. 592. however, it appears that the Master of the Rolls held decidedly, that a notice of a judgment not docketed was not material. But this decision cannot be relied on; the effect of it would be to overrule all the decisions on the statutes for registry. They were passed for precisely the same purpose as the act of William and Mary, viz. to enable purchasers readily to discover incumbrances; and therefore, if a purchaser has notice of any judgment, the statute does not, in equity, extend to him, as he is already in possession of what the legislature intended to furnish him with. From these observations it is clear that there are few cases in which judgments ought not to be searched for on the part of a purchaser; and if there is any reason to suspect the vendor, it is absolutely necessary to search immediately before the conveyance is executed, lest any judgments may have been entered up during the treaty; although, if any judgments should be entered up after the purchase money, being an adequate consideration, is actually paid, equity would relieve the purchaser against the judgment's, notwithstanding that they were entered up previously to the execution of the conveyance; the vendor being, in equity, only a trustee for the purchaser, and a judgment being merely a general lien, and not a specific lien on the land; and this equity prevails, whether the judgment creditor had or had not notice of the contract; see *Nels. Cha. Rep.* 184; 1 P. Wins. 278; 10 Mod. 418; Vin. Abr. 182. It seems advisable to ask the vendor or his attorney whether there are any incumbrances which do not appear on the abstract? For, if he answer in the negative, the search for judgment may be postponed till immediately before the execution of the conveyance; and if there are any judgments, and the purchase cannot be completed on that account, the purchaser can recover all his expenses of the vendor; see 1 Esp. Ca. 268. A purchaser who, at the time of his contract, is seized of the legal estate, as a mortgagee, need not search for judgments subsequently to the mortgage; for an equity of redemption is not within the clause of the statute of frauds, which will shortly come under our consideration. The judgment is a lien upon the estate in equity; see *Nels. Cha. Rep.* 87; 1 Cha. Ca. 36; and confers a right on the creditor to redeem a prior mortgage or other incumbrance; see 2 Cha. Rep. 180. And by the first principles of equity, a purchaser, with notice of any incumbrance, is bound by it in the same manner as the person was of whom he purchased. And, indeed, it has been expressly decided, that a mortgagee purchasing the equity of redemption, is bound by judgments of which he has notice, although they were entered up subsequently to the mortgage; see *Cha. Ca.* 170; 7 Vin. Abr. 52. This doctrine prevailed before the statute of frauds, and has been the observed rule of equity ever since; and it seems clear that

XII. RELATIVE TO THE DOCKETTING OF.†

1. SALE V. CROMPTON. E. T. 1774. K. B. 1 Wils. 61; 2 Stra. 1208.

As the ob-
ject of the
statute of
W. & M. is
(686)
to enable
purchasers
to discover
judgments
the names
of the per-
sons against
whom they
are entered
and if the
name of a
defendant
is not be-
lieved to be
ly entered
the judg-
ment will
be void a-
gainst pur-
chasers, and
the Court
will not a-
mend the
record;

This was a judgment by *nil dicit*, upon a warrant of attorney in 1732, the entry whereof upon record was mistaken, it being Compton instead of Crompton. Now, the counsel, upon producing the warrant of attorney, and showing the bill upon the file, were both against Crompton, and right; moved to have the record amended. On the other side it was said, that what was prayed was rather that the Court would make a new judgment against another person than an amendment, for that here the record was of a perfect judgment, and no ways erroneous against Crompton, and that to alter this judgment to Crompton would be of the utmost ill consequence to purchasers. Sir Danvers Osborne, since the entry of this judgment, has purchased lands of Crompton, and an affidavit has been read to the Court on his behalf, that he did not know of, or ever heard of, this judgment; and that he has paid the full purchase money for the land. He further insisted, that it was not in the power of the Court to grant what was prayed at this distance of time, and that every amendment of a judgment generally ought to be made in the same term in which it is given; but supposing the Court would do it, yet he insisted they could not now amend the docket-book since the stat. 4 & 5 W. 3., and then it would be a judgment not docketted, which would not affect a purchaser. But the rule to show cause was discharged by the whole Court. Lee, C. J. said: Crompton might have other estates, and for any thing that appears to us, there may be other purchasers besides Sir Danvers Osborne, who may be affected if we should make the alteration prayed.

Chapple, J. said that it would be going further than ever was gone before; that as to the bill upon the file, it was no bill in this cause; that it was a perfect judgment, no ways defective, and that to alter the name to Crompton would be making a new judgment.

Wright and Denfison, Justices, were of the same opinion.

2. WAIT V. GARTH. T. T. 1733. C. P. 1 Stra. 659; Barnes, 261. 262.

Or if there
be no dock-
et, the pur-
chaser or
mortgagee
will not be

Judgment was signed of Hilary term, 1733, but by omission of plaintiff's agent the roll was not docketted and carried into the office till the 29th of June, 1757; and the true day of docketting was marked upon the docket by the clerk of the essoigns. Milner, who pretended to be a purchaser of defendant's estate, for a valuable consideration, on the 19th of June, 1736, without

previously to the statute of frauds, a judgment creditor was in like manner and upon the same principles relieviable in equity against a conveyance to trustees; and by the 10th sec. of that statute it is enacted that execution may be delivered upon any judgment, statute, or recognizance, of all such lands, &c., as any other person or persons shall be seized or possessed of in trust for him against whom execution is so issued, in the same manner as if he had been seized of such lands, &c., of such estate as they he seized of in trust for him at the time of the execution sued, and shall be held discharged of the incumbrances of the trustee. Upon the construction of this statute, it hath been holden that, if a trustee has conveyed lands before execution sued, though he was seized for the defendant at the time of the judgment, the lands cannot be taken in execution. Now it is clear that where the fee is in trustees, the purchaser would not be bound by any judgment upon which no writ of execution had been sued, of which he had no notice. But here, as in the preceding case, the purchaser, it is conceived, cannot be advised to rely on the legal estate in the trustee, where he has notice of any subsequent judgments.

* As against bankrupts judgment creditors come in equally with other creditors; 1 P. Wms. 737. 739. But if A. conveys a judgment to B., and then sells and conveys the land for a valuable consideration to C., and afterwards becomes bankrupt, the judgment creditor shall extend the lands in the hands of C., who bought subsequent to the judgment, and prior to the bankruptcy this not prejudicing the other creditors.

† Although the 14th and 15th sections of the 29. Car. 2. c. 3. settled all differences respecting the fiction of law, whereby judgments were supposed to be of the first day of the term, by compelling the party to set down the particular period when the judgment was signed, and declared that as against purchasers *bona fide* for a valuable consideration, the lands, tenements, and hereditaments to be charged thereby, should be charged only from such time as the judgment was signed; yet, inasmuch as it did not compel the plaintiff to carry in the judgment roll, purchasers and others were rendered almost incapable of discovering what judgments were recovered.

notice of this judgment, moved, and had a rule for plaintiff to show cause why the docket should not be set aside or void by the statute 4 & 5 W. & M. c. 20. Upon showing cause, it appeared, that the judgment was for a debt *bona fide*, and that the roll was accidentally mislaid, and omitted to be carried in; the true time of docketting appeared to be plainly and fairly entered, without fraud; and an *elegit* upon this judgment appeared to be executed in 1735; and that Milner had notice thereof, who seemed upon the affidavits to be a colourable purchaser to assist defendant. *Per Cur.* The true time of docketting not being concealed, and no fraud appearing on the part of the plaintiff, we will not interpose; Milner may bring his ejectment; and take what advantage he can. It appeared that Milner had not made any search for judgment against defendant till after his purchase. The rule was discharged.

S. HICKEY v. HAYTER. T. T. 1795. K. B. 6 T. R. 384. HICKEY v. HAYTER.

E. T. 1795. K. B. 1 Esp. 313. WALKER v. CONSTABLE. T. T. 1798.

C. P. 1 B. & P. 307.

Debt on a judgment recovered against the intestate in his lifetime, to which the defendant pleaded *plene administravit*. The plaintiff gave in evidence an inventory of the intestate's effects, signed by the defendant, in which it appeared that she had received assets to the amount of 374*l*. In order to discharge herself, she proved payment of bond and other specialty debts amounting to 618*l*. The plaintiff contended, that the payment of these debts before the plaintiffs, which arose on a judgment regularly entered up against the intestate was a *devastavit* in the defendant. This was answered on the part of the defendant, by saying that, as the judgment was not docketed in pursuance of the stat. 4 & 5 W. & M. c. 20. it was not entitled to any preference over any other debts. A verdict, however, was taken for the plaintiff, with liberty to the defendant to move to set it aside and to enter a nonsuit, if this Court should be of opinion with her on the construction of the act of parliament. *Per Cur.* The act of parliament having said that this debt shall have no preference because it is not docketed, it is put on the footing of a simple contract debt; and, on the plea of *plene administravit*, the administratrix may give in evidence payments of all debts not of an inferior nature. Before this act of parliament, this case would have come within that of Littleton v. Hibbins; though, in 2 And. 159. the Court thought that an executor ought

affected by the judgment.*
[687]

And by this statute, debt on judgment against a testator or intestate, not docketed according to the direction of the act, is put on a level with the simple contract debts †

* But although a judgment is not duly docketed, and, therefore, void against a purchaser, yet, if the purchaser had notice of it, and did not pay the value of the estate, it will be presumed that he agreed to pay off the judgment, and equity will compel him to pay it. The general rule of equity would warrant an assertion that the case would be the same although no agreement was made. In the case of Forshall v. Coles, however, it appears that the Master of the Rolls held decidedly that notice of a judgment not docketed was not material. But this decision can not be relied on; the effect of it would be to overrule all the decisions on the statutes for registry. They were passed for precisely the same purpose as the act of William and Mary, viz. to enable purchasers readily to discover incumbrances; and, therefore, if a purchaser has notice of any judgment, the statute does not in equity extend to him, as he is already in possession of what the legislature intended to furnish him with.

† And time was given to enter up judgment as of a precedent term, *nunc pro tunc*, the Court of King's Bench, in order that it might not affect purchasers and mortgagees; ordered it to be docketed of the term in which application was made; Baker v. Baker, 2 Tidd 973. Therefore, by the stat. 4 & 5 W. & M. c. 20. s. 3 it is enacted, that "no judgment not docketed and entered in the books kept for that purpose according to that act, shall effect any lands or tenements, as to purchasers and mortgagees, or have any preference against heirs, executors, or administrators, in the administration of their ancestor's, testators', or intestate's effects." Dockets or indexes to judgments were in use long before this statute. They were invented by the Courts for their own use and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large. The statute of William and Mary did not supercede the former practice of docketting the judgment on parchment or paper, which is still necessary to be done by the attorneys on entering and assigning in the rolls, but was intended to operate in addition to that practice, by requiring the dockets to be entered in alphabetical order by the officers of the court. Tidd's Prac. 858. 860. 3rd Edit. Gilb. c. 6. s. 100. Now upon the provisions of this act it is to be observed, that judgments cannot be docketed after the time mentioned in the act; and the practice of the clerks in docketting them after that time is only an abuse for the sake of their fees, and ineffectual to the party.

- [688] not to be charged with a judgment of which he had no notice. If simple contract debts had been paid by the administratrix before a bond debt, without notice of the latter, such payments must have been pleaded to an action on the bond, because bonds are still on the same footing that they were before the act of parliament; but the statute puts a judgment not docketted on a level with simple contract debts, and therefore payment of the bond debts in the present case was properly received in evidence, under the plea of *plene administravit*. See 1 B. & P. 309.

4. REX v. FIELDING. H. T. 1759. K. B. 2 Burr. 722.

Seemle,
the chief
clerk would
be liable to
an action at
the suit of
a purchaser
who should
be aggrieved
by his
neglect in
making a
proper
docket.*

A neglect of entering judgment and a loss of the roll having been sufficiently shown to the Court, a rule was made that the clerk of the judgments shall sign a new roll, whereon is entered the judgment signed in this cause in Michaelmas term, 1729; and that the same be numbered as roll 256, and filed amongst the rolls of that term, a special entry being first made expressing the day of docketing the same; and it is further ordered, that this judgment shall not be made use of against the administration of the defendant's note.

Lord Mansfield, intimated that it very much concerned the chief clerk to take care that judgment be actually entered upon the roll in due time and docketted; for that after he has received his fees for making such entry, he would be liable to an action upon the case, to be brought by a purchaser who should have become liable to it, and had searched the roll without finding it entered up; and he said that the attorney who had undertaken to do this and neglected it, would be liable, indeed, to the chief clerk; but still the chief clerk would be liable to the purchaser, who had suffered by this neglect.

XIII. RELATIVE TO THE REGISTERING OF.†

XIV. RELATIVE TO AMENDING OF. See *ante*, tit. Amendment.

- [689] XV. RELATIVE TO WHEN JUDGMENT ROLL IS LOST.‡

XVI. RELATIVE TO ACTIONS ON.

(A) FORM OF, AND WHEN SUSTAINABLE.

1. ANON. T. T. 1703.. K. B. 2 Salk. 209

Per Cur. Debt lies in the Marshalsea, or any other courts, upon judgments in C. B., or B. R.; and upon *nul tiel* record, the issue shall be tried by *certiorari* and *mitimus* out of Chancery. The judgment being the gist of the action—*quare*, how can that be alleged to be within the jurisdiction which is necessary? See Com. Dig. Debt. A. 2; Gilb. Debt., 391; Com. Dig. Debt. A. 2; Selw. N. P. 530

2. WHEATLEY v. LANE. M. T. 1767 K. B. 1 Saund 216; 6 Mod. 306.

An action
of debt is
the proper
remedy up
on a judg-
ment in a
superior or
inferior
court of
record;
Either gen-
erally, or a-
gainst an
executor or
administra-
tor suggest-
ing a *devas-*
avit.

Debt in the *debet.* and *detinet.* The plaintiff declared that he had recovered a judgment in debt in this court, against the defendant as an executor, and that after the judgment, the defendant had wasted the goods of the testator to the value of the debt recovered, whereby an action had accrued to the plaintiff to demand and have of the defendant the said debt, and get the said, &c. And upon this declaration there was a demurrer; and the sole question was,

* If an attorney neglect to enter and docket the judgment in due time, by which a loss arises to his client, it seems that he is liable to an action: 1 Stra. 639.

† To give effect to a judgment as against purchasers and mortgagees of land in Middlesex and Yorkshire, it is necessary it should be registered: for by the 5 Anne, c. 18. s. 4. and several subsequent statutes, "no judgment shall affect or bind any manors, lands, tenements, or hereditaments, in these counties, but only from the time that a memorial of such judgment shall be entered at the register-office, in such manner as therein is directed." But none of the acts extend to copyhold estates, or to leases at rack-rents, or not exceeding twenty-one years where the actual possession and occupation go along with the lease. The act for the county of Middlesex does not extend to any of the chambers in Serjeant's Inn, the inns of court, or inns of chancery. And although a judgment be not duly registered, yet a purchaser with notice will be affected by it in a court of equity. But docketting a judgment was holden by Lord Chancellor Talbot not to amount to constructive notice, for judgments, he said, are infinite.

‡ Where the judgment roll was lost, the Court allowed it to be supplied by a new entry,

whether such an action lies upon a bare suggestion of a *devastavit*, or not. But the Court, upon the cases of *Cory v. Thinny*, and *Harvell v. Ellis*, which Twysden, J., said he remembered, delivered their opinion for the plaintiff, that the action was well brought, and gave judgment accordingly for the plaintiff.

3. *PRINCE V. NICHOLSON*. T. T. 1814. C. P. 1 Marsh. 284.

Action against an executor, for goods sold to the testator, the defendant at Nisi Prius pleads a plea, *puis darrien*, continuance of judgment recovered in a plea of debt on the simple contract of the testator, commenced since the present action. On demurrer, held 1st, that it was no answer to this plea, that the judgment pleaded was on a plea of debt on the testator's simple contract; a 2dly, That the plea was not invalidated by the defendant's having suffered judgment to pass against him involuntary. See 2 Lev. 161.

And tho' the judgment was erroneous, yet debt lies until it has been reversed.*

4. *VIGERS V. ALDRICK*. M. T. 1769. K. B. 4 Burr. 2483. *TANNER V. HAGUE*. [690] M. T. 1797. K. B. 7 T. R. 420.

This was an action of debt upon a judgment. It appeared upon the plea, and was admitted by the replication, that the defendant's person had been taken in execution, by virtue of a *capias ad satisfaciendum*, upon this judgment; and afterwards discharged out of custody by consent of the plaintiff, upon his entering into an agreement to pay certain sums of money at stipulated times, part whereof he had accordingly paid to the plaintiff, pursuant to the said agreement, but had failed in payment of the remaining part. The plaintiff, in his replication, acknowledged all this; and yet concluded it with demanding the whole sum due upon the judgment. The defendant demurred to the plaintiff's replication. It was for the defendant argued that the defendant having been once taken upon execution upon this judgment, and afterwards discharged of the execution against his person, by the consent of the plaintiff, he could not be liable to any further execution upon it; nor could the plaintiff bring an action of debt upon that same judgment, which had been already so carried into execution, and the defendant so discharged from it. The Court held this to be an absolute consent in the plaintiff to discharge the defendant out of execution, in consideration of a new agreement then entered into, whereby he was to receive several sums of money instead of the person of the defendant (which was all that he could have had, if he had kept the defendant in gaol); and that he could not bring an action upon the judgment, after the defendant had been taken in execution and discharged by the plaintiff's own consent, but ought to have brought a new action upon the case, founded upon this new agreement.

But where the defendant has been in execution on the judgment, and discharged with the plaintiff's consent, no action can be supported on the judgment.†

5. *GRIFFLE V. ABBOT*. E. T. 1774. K. B. Cowp. 72; 2 Bl. Rep. 782.

It was moved to stay the proceeding in an action upon the judgment, pending a writ of error. The counsel, on showing cause, produced an affidavit, in which it was sworn that the defendant himself had acknowledged, that the writ of error which had been depending two years was merely for delay. The Court ordered, that upon the defendant's confessing judgment in this action, and undertaking to bring no writ of error thereupon, the execution should be stayed, until the determination of the writ of error depending.

Or after the defendant has been in execution and on period;‡

Mr. Justice Aston said, the Court had made a like rule a few terms ago. It was then objected that the defendant might still bring his bill in equity. But the Court said, that they could not make him undertake to waive his right in that respect.

6. *BANWELL V. BLACK*. E. T. 1790. K. B. 3 T. R. 643. *TASWELL V. STONE*. [691] T. T. 1769. K. B. 4 Burr. 2454.

The Court held that if the defendant bring a writ of error, and the plaintiff

Or pending a writ of error.

* And the circumstance of the defendant having been rendered makes no difference, unless the plaintiff has made his election by charging the defendant in execution; 6 Ves. 446.

† And when the defendant has been discharged under the Insolvent or Lord's Act, no action is of course sustainable; as to the form of action on a foreign judgment; see post.

‡ If a part of the debt be levied under an execution, an action may be sustained on the judgment for recovering the residue; 1 N. R. 133.

bring another action on the judgment, and recover, he cannot sue out execution on the second judgment till the writ of error be determined:

See *ante*, tit. Error, Writ of.

(B) IN WHAT COURT.*

1. FOOTT v. COANE. M. T. 1801. C. P. 2 B. & P. 588. COANE v. KENE-
DAY. H. T. 1801. K. B. (*semb. contra.*) 3 Esp. 280.

The Court of Requests Acts for London have been construed to extend to an action of debt for less than 5*l.* on the judgment of a superior court.

This was an application to set aside judgment entered up in this case as to the costs. The circumstances under which the application was made were these: The plaintiff commenced an action of assault in this court against the defendant, and obtained a verdict for 20*s.* whereby he became entitled to no more costs than damages. The plaintiff then brought an action of debt upon the judgment, upon which the defendant's attorney tendered to the plaintiff's attorney his 40*s.* and gave him notice that, if he took a judgment by default and entered it up for costs, the Court would be moved to set that judgment aside as to the costs. This tender was refused, and judgment being suffered to go by default, was signed by the plaintiff's attorney for debt and costs in Trinity term last, and an execution issued thereon in the vacation following. To found this application, there was an affidavit on the part of the defendant, stating that he was an inhabitant and resident of the city of London, and liable to be summoned to the Court of Requests in that city, and that the debt sued for and recovered by the plaintiff amounted to no more than forty shillings; the 39 & 40 Geo. 3. c. 101. (local and personal acts) repealing so much of the statutes of Jac. 1. c. 15., and 14 Geo. 2. c. 10. as confined the jurisdiction of the Court of Requests to forty shillings, and extending that jurisdiction to 5*l.* The 12th section of the act enacts, that if any action or suit shall be commenced in any other court than the said Court of Requests, for any debt not exceeding the sum of 5*l.*, and not recoverable by virtue of the statutes of Jac. 1. and Geo. 2., and of this act or any of them, in the said court of Requests, then and in every such case the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever. The whole Court was of opinion that the present case fell within the provisions of the act, and that it would be most vexatious if every plaintiff, obtaining a small sum by way of damages, should be at liberty to bring an action of debt upon the judgment in the superior court, and harass the defendant with additional costs.—Rule absolute:

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(C) HOLDING TO BAIL.

1. NIGHTINGALE v. NIGHTINGALE E. T. 1788. C. P. 2 Bl. Rep. 1274.
NICHOLS v. WILDER. E. T. 1732. C. P. Barnes, 432; S. C. Prac. Reg.
60. DEBALFE v. MAKENSIE. E. T. 1736. C. P. Barnes, 73; S. C. 2
Stra. 1243. LEWIS v. POTTLE. H. T. 1792. K. B. 4 T. R. 570. BUSH
v. BATES. M. T. 1770. K. B. 5 Burr. 2660. ROBINSON v. NICCOLLA.
T. T. 1737. K. B. 2 Stra. 1077. BELITHER v. GIBBS. T. T. 1760.
K. B. 4 Burr. 2117.

Formerly a defendant might have been held on to bail in an action on a judgment, although the original debt was under the sum required to authorize an arrest.*

There being a judgment of nonsuit, and the costs recovered by the defendant amounting to upwards of 10*l.*, he brought an action on this judgment, and held the plaintiff in the original action to special bail. On a motion to discharge the non-defendant on a common appearance, the cases of *Palmer v. Needham*, 3 Burr. 1389; and *Belither v. Gibbs*, 6. 7 Geo. 3., 4 Burr. 2117, were cited, by which it appeared that the practice of the Court of King's Bench was where the original debt was under 10*l.*, but with the costs amounted to more than 10*l.*, in an action of debt on this judgment, not to hold to special bail; but the practice in Common Pleas was otherwise. And in the latter case, Lord Mansfield is reported to have said, he had conferred with all the judges, and believed the Common Pleas would alter their practice. And

* The action may be brought in a different court to that in which the judgment was attained: *Gilb. Debt*, 392, 393.

† The 6 Geo. 4. enacts, that no person shall be held to special bail where the cause of action shall not have originally amounted to the sum of 20*l.* or upwards, over and above, and exclusive of any costs, &c.

it is argued that if the defendant was not to be held to bail, where part of the 10*l.* arose from costs, *a fortiori*, he ought not where, as in the present case, the whole demand arose from costs alone.

But De Grey, C. J., and *tot. Cur.* No instance has been shown where this Court has ever refused to hold to special bail, where the whole or part of the demand (upon which the action upon judgment is brought) arises from the recovery of costs. But a multitude of cases the other way; and we see no reason to depart from the practice of the court. Costs recovered for groundless prosecutions are as fair a debt as for any consideration. And by

Gould, Justice. The reporter in *Belather v. Gibbs* must have mistaken Lord Mansfield; for I was then a judge in this court, and remember no such conference.

2. KENDAL *v.* CAREY. T. T. 1756. K. B. 2 Bl. Rep. 768. JACKSON *v.* DUCKET. H. T. 1726. Ca. Prac. C. P. 32. more fully reported in Prac. Reg. C. P. 54. GLASSCOCK *v.* MORGAN. H. T. 1652. K. B. 1 Lev. 92. CRUTCHFIELD *v.* SEWARD. E. S. 1749. C. P. Barnes, 116: 2 Wils. 93. HESSE *v.* STEVENSON. M. T. 1804. K. B. 2 Smith, 39. And now, whenever judgment has been obtained for a debt exceeding the requi- [693] site sum over and above the costs and expenses, the defendant may be arrested.*

It was moved to stay proceedings in an action of debt on a judgment, and that the bail bond might be delivered up; because the defendant had brought a writ of error on the judgment, and given bail in error in the King's Bench; so that two securities were obtained at once for the same cause of action, contrary to Lord Raym. 47. Gould, Justice. The reason of this practice is, because there has never been bail given in this court. The usage of the King's Bench, I believe, is different; but I think this court is right. These are checks against delay, and ought not to be taken off. Rule discharged.

3. BOWEN *v.* BURNETT. M. T. 1754. K. B. Say. Rep. 160.

Upon a rule to show cause, why there should not be special bail in an action of debt upon a judgment, it appeared that one of the special bail in the original action had absconded, and that the other was become insolvent. The rule was discharged. And by the Court.—It has been frequently holden, that if there was special bail in the original action, and the plaintiff in that action bring an action of debt upon the judgment therein obtained, he is not entitled to special bail in the latter action. As there is a degree of vexation in bringing an action upon a judgment, such an action ought not to be favoured.

4. CRUTCHFIELD *v.* SEWARDS. E. T. 1749. C. P. Barnes 116; S. C. 2 Wils. 93; *sed vide* DE LA COUR *v.* READ. H. T. 1749. C. P. 2 H. Bl. 278. *contra*. subsequent action have been absconded or be

Defendant was arrested in the original action by a common *capias* in Kent, whereupon he put in and justified bail in court. Plaintiff declared in London (not in Kent), whereby he relinquished and lost his bail; and after judgment obtained in the original action, brought an action of debt on that judgment, wherein the defendant being again arrested, put in and justified bail in court, the 2nd of May. The first day of this term, 4th of May, defendant moved and obtained a rule to show cause, why the last recognizance of bail should not be discharged, and why a common appearance should not be accepted in lieu thereof; and upon showing cause and hearing counsel on both sides, the rule was this day (May 8th) made absolute. The established practice is, that where plaintiff has bail in the original action, he shall have none in his action on judgment; where plaintiff has no bail in his original action, he shall have bail in his action on judgment. But in this case plaintiff, by his own act, gave up bail in the original action, and therefore shall not compel defendant to give bail a second time. Actions on debt or judgment are not to be encouraged after judgment; execution should follow, and not a fresh suit. By the general rule (8 Geo. 2.) it is ordered, that no prisoner, discharged or ordered to be discharged by supersedeas, for want of prosecution, shall be held to bail in debt on judgment in the case wherein he has superseded, which is similar to the

* Although a writ of error be pending, on which bail have been put in; *Weyman v. Weyman*, Barnes, 77; S. C. 2 Com. 556; S. C. *Kendall v. Carey*, 2 Bl. Rep. 768.

present case, where, if the prisoner is discharged, it is plaintiff's own fault, where the bail in the original action might have been charged.

- [694] 5. BLANDFORD v. FOOT. E. T. 1774. K. B. Cowp. 72. 8. P. REVEL v. SNOWDEN. M. T. 1793. C. P. Pr. Reg. C. P. 77. CHAMBERS v. ROBINSON. M. T. 1715. K. B. 2 Stra. 782. HALL v. HOWES. E. T. 1756. K. B. Id. 1039. PIERSON v. GOODWIN. M. T. 1798. C. P. 1 B. & P. 361.

Or the defendant has surrendered in their discharge, and obtained a *supersedeas*.

This was a rule to show cause, why the writ of *ad satisfaciendum*, issued in this cause, should not be set aside for irregularity, and why the defendant should not be discharged out of the custody of the Sheriff of Middlesex as to this action. The defendant had been superseded, for want of being charged in execution within two terms after judgment. Eight years after, the executors of the original plaintiff brought an action of debt on the former judgment; and, having obtained judgment in this second action, caused the defendant to be taken on the *ca. sa*, mentioned in the rule, whereupon the above rule was obtained. *Per Cur.* A defendant cannot be taken in custody again upon the same judgment after being superseded, nor can he be held to bail in a second action; but in a new action, we are inclined to think, he may be charged in execution. Wright, J. thought he could not; but Denison, J. doubted whether the Court could prevent it, because the second judgment was for costs also. The case was adjourned.

6. WHALLEY v. MARTIN. M. T. 1763. C. P. Barnes, 62.

Unless the action has been superseded by surprise.

Defendant, superseded three years since, and arrested again for the same debt, moved to be discharged, upon entering a common appearance; but it appeared that one Williams, formerly plaintiff's attorney, had, after leaving a declaration in the office, deserted the cause and absconded, whereby defendant obtained a *supersedeas* by surprise, without plaintiff's knowledge. Defendant was held to bail.

7. CHAMBERS v. ROBINSON. M. T. 1715. K. B. 2 Stra. 782.

When a defendant was superseded in an action upon a judgment, and again arrested in an action upon the second judgment, the Court discharged him upon common bail.

The defendant after judgment surrendered himself in discharge of his bail, and lay two terms without being charged in execution; during which time the plaintiff brought an action of debt upon the judgment, and after a recovery in that action, the defendant lay two terms more without being charged; and the plaintiff brought another action of debt upon the second judgment, whereupon the defendant moved for a *supersedeas* as to the two first actions, and that common bail might be accepted in the last. And, upon consideration, both were granted. It was agreed that at the first action of debt on judgment special bail might be required, but the Court said it would be a handle of oppression if they carried it any further.

8. SALKELD v. LANDS. E. T. 1801. C. P. 2 B. & P. 416. DAVIES v. LÉONIE. M. T. 1744. C. P. Barnes, 84.

[695] And if a defendant, on being arrested up on process out of K. B. gives a warrant of attorney to confess judgment, the latter Court will discharge him upon a common appearance being entered.

The defendant in this case having been arrested by process out of the King's Bench, gave a warrant of attorney to confess judgment; on that judgment the present action was commenced, and the defendant holden to bail. A rule nisi having been obtained for discharging him on entering a common appearance; The Court (consisting of Heath, Rooke, and Chambers, Justices,) were of opinion that the giving a warrant of attorney to confess judgment was tantamount to giving bail in the first action, and that the defendant in this case, if held to bail again, would suffer precisely the same vexation as in the common cases to which the rule was allowed to extend.—Rule absolute.

judgment, and he afterwards holden to bail in C. P. in an action upon the judgment, the latter Court will discharge him upon a common appearance being entered.

(D) DECLARATION ON.

In declaring upon a judgment obtained either in an inferior or superior court, it is

1. MURRAY v. WILSON. H. T. 1752. K. B. 1 Wils. 316. BENTLEY v. BAYTON. H. T. 1799. K. B. 8 T. R. 127. HAYWARD v. RIBBANS. M. T. 1803. K. B. 4 East, 311. HORSY v. DANIEL. H. T. 1675. C. P. 2 Lev. 161. MOSES v. MACFERLAN. E. T. 1760. K. B. Burr. 1007. DRAKE v. MITCHELL. H. T. 1803. K. B. 3 East, 258.

Debt upon a judgment of nonsuit in an inferior court. It was objected, but

That a judgment of nonsuit in an inferior court would not lie. 2dly, That if it will lie, yet the declaration is bad in substance, for it does not appear that the plaintiff in the count was levied for a cause of action arising within its jurisdiction. 3dly. The declaration ought to have set out the plaint and the subsequent proceedings thereon, and cited some old cases to show this. The Court gave judgment for the plaintiff upon the first argument, and said that the declaration was a very good one, both in form and substance. The nonsuit is laid to be given and recorded at a court held within its proper jurisdiction, and that is sufficient; and the plaintiff below's process may be illegal from beginning to end, for ought we know, and the declaration would have been good upon a special demurrer.

2. LEWIS V. WEEKS. T. T. 1688. K. B. Carth. 86.

Debt upon a judgment in an inferior court, in which the plaintiff declared, that at such a court, *coram sectatoribus*, without naming them. The Court said there is always some difference in declaring in an action of debt upon a judgment had in a court of record, and upon a judgment obtained in a court not of record. For, in the first case, it is sufficient to declare generally *ut supra*; but in the last case, the declaration always ought to be special; and in the principal case, the action being founded on a judgment obtained in the hundred court, which is a court of record, and the declaration being too general, it is, therefore ill. Then it was objected that the plaintiff in his declaration had not named suitors as he ought, because they are the judges of this court, and that for these reasons the declaration was ill. See 2 East, 362; S. C. Id. 516. 565.

3. COY V. HYMAS. M. T. 1781. K. B. 2 Str. 1171. PURCELL V. MACNA-

MARA. M. T. 1807. K. B. 9 East, 157. PHILLIPS V. EAMER. T. T.

1795. K. B. 1 Esp. 356. READSHAW V. ATKINS. T. T. 1811. C. P. 4

Taunt. 18. PHILLIPSON V. MANGLES. M. T. 1809. K. B. 11 East, 516.

RASTALL V. STRATON. T. T. 1787. C. P. 1 H. Bl. 49.

The plaintiff obtained judgment for 388l. 0s. 1d. In debt thereon he described it as a judgment for 388l. only omitting the penny; the defendant pleaded *nil tiel* record; and on issue joined, insisted on the variance. The plaintiff desired it might stand over, and at another day produced the record with a *remittit* of the penny added. The Court resented this as an abuse of their indulgence, and said they would still consider it in the situation it was in before; or if not, yet the variance was not cured, for a *remittit* must come before judgment, whereas this is after; and considering it as reducing the first judgment, is making an inconsistency on the record. The most it can amount to is an acknowledgment of so much of the money recovered. The defendant had judgment of *deficit de recordo*.

4. IMPEY V. TAYLOR. M. T. 1814. K. B. 3 M. & S. 166.

An allegation, that an action was depending in the Court of King's Bench at Westminster, was held not sustained by proof of a *pluries* bill of Middlesex, for by such allegation the Common Bench must be intended.

5. MORSE V. JAMES. M. T. 1738. C. P. Willes, 127. WAITES V. BRIGGS.

M. T. 1693. K. B. 2 Salk. 565.

Per Cur. It has been said, that where a matter of record is insisted on only by way of inducement, the plaintiff or defendant who insists upon it need not conclude *prout patet per recordum*; and several cases were cited to this by the purpose, particularly the case of Waites v. Briggs, reported in 2 Salk. 565; 5 Mod. 8; 1 Ld. Raym. 35. S. C. We admit the rule. In the case of Waites

* It is however necessary to show, with certainty, the terms and parties, and the sum recovered; and it is said, that if the declaration be on a judgment in the C. P. it should be stated before what judge it was recovered; Com. Dig. Pleader, 2 W. 12; sed vide, 2 Chit. Pl. 225. The venue must be laid in the county where the record is, or in Middlesex upon a judgment in either of the superior courts at Westminster.

† Sed. *quæ*. see 8 & 9 Geo 4.

‡ But the omission is aided unless the defendant demurs specially; 4 Anne c. 16. s. 1; and see 11 East, 565. It is usual also to allege, that the judgment still remains in full force and effect, and that the plaintiff has not obtained execution or satisfaction thereof; but this allegation is unnecessary; 1 Saund. 330. n. 4.

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In order to stay the proceedings in an action of debt on judgment on writ of error, it is necessary, if the action be bailable, that the defendant should be first in court by putting in and perfecting bail. And where an action is brought up upon a judgment of the C. P., the Court of K. B. will not stay the proceedings pending a writ of error, without the defendant's giving judgment in the second action; And under taking not to bring a writ of error upon that judgment.*

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And where the proceedings were suspended without imposing these terms and the plaintiff died before judgment affirmed, the Court would not afterwards

v. Briggs, which was an action of debt on an escape, the judgment and execution might, with some propriety, be said to be only inducement; the escape being the gist of the action. But it is impossible to think that my Lord Chief Justice Holt should say what he is reported to have said *obiter* in that case: "In an action of debt on a judgment, the judgment is only inducement, and therefore the plaintiff need not conclude *prout patet per recordum*."

(E) STAYING PROCEEDINGS PENDING WRIT OF ERROR.

1. SMITH v. SHEPHERD. M. T. 1792. K. B. 5 T. R. 9. ABRAHAM v. PUGH. T. T. 1822. K. B. 5 B. & A. 903; S. C. 1 B. & C. 455.

Motion to stay the proceedings in an action on a judgment pending a writ of error. It was contended that the defendant had no right to make the motion till bail had been put in and perfected, and therefore the rule must be discharged, and cited Smith v. Shepherd 5 T. R. 9. and Bichnell v. Longstaff, 6 T. R. 445. *Per Cur.* We think that, in order to expedite proceedings in error, it is at all events right to hold that a party shall not be allowed to make any motion under such circumstances until he has put in and perfected his bail.

2. BATES v. LOCKWOOD. H. T. 1787. K. B. 1 T. R. 638. NEWMAN v. BUTTERWORTH. H. T. 1734. C. P. Pr. Reg. 82.

The facts of this case are detailed, *post*, 698.

Buller, J. There is a distinction between the cases where an action is brought upon a judgment in the court of Common Pleas and where brought upon a judgment of this court. In the first case the Court will not stay proceedings, pending a writ of error, without the defendants giving judgment in the second action. But if it be brought upon a judgment of this court, these terms make no part of the rule, because, in general, actions upon judgments are vexatious, and the plaintiff might have his execution on the first judgment; the cases where judgment has been permitted to be entered *nunc pro tunc* have been where the delay has proceeded from the act of the Court.

3. GRIBBLE v. ABBOTT. E. T. 1774. K. B. Cowp. 72. BARKER v. BUTLER. T. T. 1737. K. B. 2 Bl. Rep. 780.

It was moved to stay the proceedings in an action upon the judgment, pending a writ of error. The counsel on showing cause, produced an affidavit, in which it was sworn that the defendant himself had acknowledged that the writ of error which had been pending two years, was merely for delay. The Court ordered, that upon the defendant's confessing judgment in this action, and undertaking to bring no writ of error thereupon, execution should be staid till the determination of the writ of error depending.

Aston, J., said the Court had made a like rule a few terms ago.

It was then objected, that the defendant might still bring his bill in equity. But the Court said they could not make him undertake to waive his right in that respect.

4. BATES v. LOCKWOOD. H. T. 1787. K. B. 1 T. R. 637.

Application to enter judgment *nunc pro tunc*. It appeared that a judgment had been obtained on an original suit in this court in Hilary term, 25 Geo. 3. between the parties. In Easter term following an action was brought by the plaintiff upon the judgment, to which the defendant pleaded *nul tiel record*. After verdict and judgment for the plaintiff a writ of error was brought in the Exchequer Chamber; and the defendant obtained a rule to stay proceedings in the mean time. In Hilary term 26 Geo. 3. the defendant in error died before judgment was affirmed; and in Trinity term following his attorney signed judgment on the second action. That judgment was set aside this term for irregularity, upon which the present rule was obtained.

Ashurst, J. The Court cannot grant this motion, as it was no part of the terms when the proceedings were stayed.

But if the action be brought upon a judgment of the K. B. these terms make no part of the rule, because, in general, actions on judgments are vexatious, and the plaintiff may have his execution on the first judgment. *Per Buller, J., T. T. 21 Geo. 3 K. B. 1 Tidd. 576.*

Baller, J. There is a distinction between the cases where an action is brought upon a judgment in the Court of Common Pleas, and where brought upon a judgment of this Court: in the first case the Court will not stay proceedings pending a writ of error, without the defendant's giving judgment in the second action. But if it be brought upon a judgment in this court these terms make no part of the rule; because in general actions on judgments are vexatious, and the plaintiff might have his execution on the first judgment. The cases where judgment has been permitted to be entered *nunc pro tunc* have been where the delay has proceeded from the act of the Court.

(F) PLEAS* AND REPLICATIONS.

1. MOORE v. BOWMAKER. T. T. 1816. C. P. 2 Marsh, 392. HAYWARD v. RIBBANS. M. T. 1803. K. B. 4 East, 311.

In action by the assignee of a replevin bond against the surety, the declaration alleges that a return of the goods was adjudged, but to that the plaintiff in replevin did not make return. The defendant pleads: 1st. That the judgment was obtained by the plaintiff by fraud in collusion with S. 2ndly. That before judgment obtained, all matters in difference between the plaintiff and S. were referred to arbitration, pending which proceedings were stayed. It was held that the first plea, not stating that the judgment was obtained for the purpose of defrauding the sureties, was no answer to the action; and that the second plea was bad, since the reference was as much for the benefit of the sureties as of the principal, and therefore no prejudice could arise to them from the delay.

2. SCOTT v. PEACOCK. M. T. 1691. K. B. 1 Salk. 271; S. C. Lutw. 641. [699]

To a *scire facias quare executionem non*, upon a judgment, the defendant pleaded that he was formerly taken in execution upon the same judgment, and the sheriff suffered him to escape; to which escape the plaintiff then and there consented. *Sed non allocator*; for the assent subsequent will not make it an escape with the consent of the plaintiff; and, therefore, he has either his remedy against the sheriff, or may retake the party.

3. WILLAUME v. GORGES. H. T. 1808. N. P. 1 Campb. 217.

Issue out of Chancery, to try whether there was any thing due upon a judgment entered up of Hilary term, 1769, to receive the payment of an annuity. The circumstances given in evidence to rebut the presumption of satisfaction from lapse of time were, that the person who was the grantor of the annuity and defendant in the judgment, soon after 1769, left the country from the degraded state of his affairs; that in 1776 he executed a trust deed at Calais, in which the grantee's name appeared as a creditor; that he revisited England at intervals under different feigned names; that he died in London under a feigned name in 1797; and that in the opinion of his most intimates friends, in the interval from 1776 to his death, he never had the means of satisfying the judgment in question. But there was no proof of any payment or of any sort of acknowledgment subsequent to the year 1776.

Lord Ellenborough, thought that, under these circumstances, the inference to be drawn from lapse of time was not rebutted, and directed the jury to presume that the judgment had been discharged by being paid off or released.

4. SANDFORD v. ROGERS. H. T. 1760. K. B. 2 Wills. 114.

This was an action upon the case upon promises. The defendant pleaded a recovery in B. R. in bar; the plaintiff replied *nul tiel* record, and *hoc paratus est verificare*; and the defendant demurred, and showed for special cause that the averment in the replication was ill. It was for the defendant insisted that, when the plaintiff had replied *nul tiel* record, there was a complete issue joined.

* *Nul tiel* record is the proper plea to an action on a judgment when there is either no record, or where there is a variance in the statement of it; Com. Dig. Pleader, 2. W. 13. and tit. Record C.; 2 Stra. 1171; 1 Saund. 92. n. 3; 3 Mod. 41. *Nul debit* is insufficient, and bad on demurrer; but even the former plea is only available when it is the defendant's intention to dispute the existence of the record, as stated in the declaration. Hence matters in discharge; as payment of debt levied by *feri facias*, by *elegit*, or defendant taken under a *capias ad satisfaciendum*; 4 Lenn. 194; Sac. 128; Cro. Car. 328; Clift. 675; release, Bac. Ab. tit. Release, must be pleaded specially.

allege that there is no such a record, and conclude with a verification and prayer of judgment.

ed, and that it ought to have been concluded with giving a day to the defendant to produce the record, and not with an averment; and this being shown for cause of demurrer, the replication is bad; and to prove this, cited 1 Barnes 240 and Cooke's Practice in C. B. 56, as directly in point, and said, that unnecessary prolixity in pleadings was to be discountenanced; that this was the same thing, in effect, as if a defendant was to plead the general issue and conclude with an averment of going to the country.

The Court (*absente* C. J.) were of opinion that the replication was very well, especially as this was a record of another Court; and seemed to think that either way was well enough.—Judgment for the plaintiff.

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And if an action be brought here on a judgment in Ireland, the plea of *nul tiel record* must conclude to the country.

5. COLLINS v. MATHEW. M. T. 1804. K. B. 5 East; 473; S. C. 2 Smith, 25. Declaration by original in debt on a judgment in the Court of Exchequer in Ireland. Whereas the plaintiff heretofore, to wit, in Hilary term, 44 Geo.

3. in the court of our said lord the King, of his Exchequer, then and there holden before the barons of our said lord the King, of his said Exchequer at Dublin in Ireland, in consideration of the said court, recovered against the said Francis, Lord Viscount Mathew, as well as certain debts of —*l.* sterling money, being Irish currency, as 50s. 2d., being of currency aforesaid, which were then and there adjudged to the said plaintiff, with his assent, as well for his damages which he had sustained on occasion of detaining that debt, as for his costs and charges &c.; whereof the said Francis Lord Viscount Mathew is convicted, as by the record and proceedings thereof remaining in the said Court of our said lord the King, of his Exchequer at Dublin in Ireland aforesaid, more fully appears, to wit, at Westminster, which said judgment still remains in the Court of Dublin in Ireland, in its full force, &c. whereby an action had accrued &c. Plea.—That there is no such record of the said supposed judgment in the said declaration mentioned remaining in his said Majesty's Court of Exchequer at Dublin in Ireland aforesaid, as, &c., and this he the defendant is ready to verify; wherefore &c. Demurrer with cause that the plea of *nul tiel record* is not pleadable to an action of debt or a foreign judgment; or if pleaded at all, it ought not to have concluded to the country, &c. but with a verification, &c. Joined in Demurrer, &c.

Lord Ellenborough C. J. It is true that this is in fact matter of record, but it is not in the power of the Court to have it proved by inspection of the record in the usual way; we cannot obtain it by *mittimus* or any other process; it is therefore to be proved only by an examined copy, as matter in pais, not even the selection of a particular fact, this being the single fact alleged as a ground for the action, the plea should have concluded to the country. But whether that be so or not, *nul tiel* cannot be pleaded to this Judgment.

6. HUBERT v. WEYMOUTH. E. T. 1779. K. B. 2 Bla. Rep. 816. SIMMONS v. NEAL. T. T. 1757. K. B. 2 Wils. 74. *contra*.

The plea of *nul tiel record* need not be signed.

It was moved to set aside a replication of *nul tiel record*, put in to a plea of judgment in another court for want of a serjeant's hand, the plea having been signed by a serjeant. And he cited Simpson and Neale, 2 Wils. 74. in point.

Per Cur. Notwithstanding the case in Wilson, we are all of opinion, that the plea of *nul tiel record* need not have a serjeant's hand, either in point of reason or of usage. The rule, therefore, must be discharged; and as Cox, the defendant's attorney, has been guilty of a trick, and has now moved the Court to give efficacy to that trick, even after he had varied all objections by paying for the issue; it must, therefore be discharged with costs.

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(H) EVIDENCE. †

* It should be delivered and not filed.

† When the existence of a judgment is put in issue, upon a plea or replication of *nul tiel record*, it must be proved by the production of the record itself, which is inspected by the Court wherein it is, if it be a record of the same court; or if of a different court, a *certiorari* must be sued out for bringing it in. And if it be a record of an inferior court, the *certiorari* may be issued out of the superior one; but if it be of a superior court, or court of equal jurisdiction, there is no way to have it but by *certiorari* and *mittimus* out of Chancery. When the existence of a judgment, however, is not denied, but it is merely stated by way of inducement to the action, or wanted to prove the fact of the recovery, §

(I) JUDGMENT.*

(J) COSTS.†

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1. ARMSTRONG v. FULLER. H. T. 1819. K. B. 1 Chit. Rep. 190.

The plaintiff commenced an action in the Common Pleas. In that action, after judgment against the principal, the plaintiff proceeded by *scire facias* against the defendants as bail on their recognisances, and obtained judgment against them by default. He then arrested the defendant in an action of debt in this court on that judgment against the bail; and in Michaelmas term last, obtained judgment on demurrer; and taxed costs without applying to the Court for costs under the 43 Geo. 3. c. 48. and in the vacation took the defendants in execution under a *capias ad satisfaciendum* for the debt and costs. The defendant on a former day in this term moved, on an affidavit, stating these circumstances, for a rule nisi to set aside the judgment and execution; and that he should be discharged out of custody on the ground of such irregularity in signing judgment for costs without the leave of the Court.

Per Cur. There is no ground for supposing that these defendants have been wilfully oppressed. With respect to the original proceedings in the Common Pleas, nothing could be more natural than the proceedings should be taken into the court in which the recognisance of bail were given; and it could not be supposed at the time that there would be any necessity of proceeding against the bodies of the bail, because there was fair reason to think that they had property enough to answer the judgment; but when it was found necessary to obtain judgment, so as to issue execution against the bodies in this court, they had a right to hold the defendants to bail. There is nothing oppressive in that. Here they certainly have taken their judgment for costs

sworn copy of it will be sufficient evidence for a jury; see *Peak's Evid.* 2d Edit. 29; and it may be proved as other transcripts, by a witness who has compared the copy, line for line, with the original, or has examined the copy while another person read the original; see 1 *Campb.* 469. 471. in notes; 2 *Taunt.* 52; *Phil. Evid.* 4th Edit. 387. But no copy of that so examined, however authenticated, is admitted; see *Gilb. Evid.* 9. And it is necessary that the record should be drawn up in form before a copy of it is given in evidence; for though, by the practice of the Courts at Westminster, the party may take out execution immediately after the judgment is signed by the proper officer, yet it is not a perfect and permanent record till the roll is brought into court, and filed; *Gilb. Evid.* 22. A judgment paper, therefore, signed by the officer, is not evidence of a judgment; see *Bull. N. P.* 228; and a verdict will not be admitted in evidence without also a producing copy of the judgment founded thereon. The production of the *postea* alone is not sufficient, for it may happen that the judgment was arrested, or a new trial granted; see *Bul. N. P.* 284; *Willes*, 307. But this rule will not apply to the case of a verdict on an issue directed out of Chancery, as it is not usual to enter up judgment in such case, and therefore the decree of the court must be shown, which will be a sufficient proof that the verdict was satisfactory, and stands in force; see *Bull. N. P.* 234; and see *Phil. Ev. d.* 4th Edit. 359. 90. And though the *Nisi Prius* record, with the *postea* endorsed thereon, is not evidence of the verdict, it is sufficient to prove that the cause came on to be tried (see 1 *Str.* 162; *Willes* 368.) on the day of trial; 6 *Esp. Rep.* 80. 88; 9 *Price*, 359. It is also a rule that when, by the practice of the court, the minutes are considered as the judgment itself, and it is not usual to make any farther entry, copies of such minutes may be given in evidence, as is always done in the case of minutes in the House of Lords. of the judgment given by them on an appeal from the Court of Chancery; *Cowp.* 17; *Peak's Evid.* 2d Edit. 34; and though copies of judgments must in general be stamped, yet it has been holden, that no stamp is necessary on a copy of the minutes of a judgment in the House of Lords; *Cowp.* 17. In order to prove the proceedings in a county court, court baron, or other inferior court not of record, the general practice has been to produce the book containing the original minutes of such proceedings, as well those previous to the judgment as the judgment itself; *Com. Dig.* tit. Evidence, C.; and 2 *Stark. N. P.* b. 73. for in the case of all inferior jurisdictions it must be shown that the proceedings are regular. And as it is not usual to draw up such judgments in form, this evidence has been deemed sufficient to support an action on a judgment of the county court, *Chandeler v. Roberts*, cited *Tidd*, 978; or to procure the proceedings on a foreign attachment in the Mayor's Court of London; 2 *Blac. Rep.* 386; *Peak's Evid.* 2d Edit. 74, 75.

* As an action of debt is the only remedy that can be adopted. The judgment is of course final; see *ante*, tit. Debt, Action of.

† By the 43 Geo. 3. c. 48. s. 4. it is enacted, that the plaintiff shall not recover, or be entitled to any costs of suit, unless the court in which such action shall be brought, or some judge of the court, shall otherwise order.

without adopting that step, which by the provision of the 43 Geo. 3. c. 46. ought to have been adopted; and by those means they have forced the defendants to make the application in question, and, therefore, the defendants are entitled to the costs of this application; see 1 East, 404; but inasmuch as it is most probable, that if the court had been applied to, there would be a ground for giving the plaintiff the costs of this proceeding, he may now have the option to reduce the judgment to the sum of 95*l*. which is now claimed, or we will now enlarge this rule to give him an opportunity of applying for his costs; or if in the mean time the 95*l*. is paid, the defendants may be discharged out of custody. At all events, the plaintiff must pay the costs of this rule.

But the statute does not extend to an action brought by the defendant to recover the costs of a judgment of nonsuit, but only to judgment recovered by plaintiff. And where a defendant against whom judgment had been obtained, sued out a writ of error, and to an action on the judgment pleaded *nul tiel record*, the Court of C. was delay. Heath, J. The defendant might have moved to stay proceedings; P. allowed the plaintiff his costs of the action upon the judgment. And in an action on a judgment, the latter Court refused to stay proceedings on payment of the debt without costs, where there was probable ground for the plaintiff also claiming interest in part of the debt.

2. BENNETT V. NEALE. T. T. 1811. K. B. 14 East, 343.

The present plaintiff having obtained judgment of nonsuit in a former action, brought against him by Neale, the taxed costs of which judgment were 8*l*. 3*s*., brought this action on the judgment to recover that amount; whereupon Espinasse moved upon the stat. 43 Geo. 3. c. 46. s. 4. for a rule, calling upon the plaintiff to show cause why, upon payment of that sum, the proceedings should not be stayed without costs; the clause directing, that in all actions which shall be brought upon any judgment recovered in England or Ireland, the plaintiff in such action on the judgment shall not recover or be entitled to any costs of suit, unless the Court in which such action on the judgment shall be brought, or some judge of the same court, shall authorise or order. And this, he said, was the first application on this clause of the act. But the Court, on reading the clause, and comparing it with the preceding and subsequent clauses, were of opinion that it extended only to judgments recovered by plaintiffs, and not to a judgment of nonsuit; and, therefore, refused the rule.

3. GARNWELL V. BARBER. M. T. 1813. C. P. 5 Taunt. 264:

A rule had been obtained in pursuance of the discretion given to the Court by the statute 43 Geo. 3. c. 46. s. 4., a rule nisi, that the prothonotary might tax the plaintiff's costs for him in this action, which was debt on a judgment commenced after the defendant had brought error in the King's Bench to reverse the same judgment. The defendant had not been arrested in the original action, but in this he was arrested. The defendant had pleaded *nul tiel record*, whence it might be inferred that the only purpose of the writ of error was delay. Heath, J. The defendant might have moved to stay proceedings; P. allowed but instead of that he pleads *nul tiel record*; the plaintiff ought to have his costs in this case.

4. WOOD V. SILLETO. T. T. 1819. K. B. 1 Chit. Rep. 473.

A rule was obtained, calling on the plaintiff to show cause why the defendant should not be at liberty to pay the sum of 1006*l*. into court, the amount of debt in this case, without costs; or why upon such payment, all further proceedings should not be stayed and satisfaction entered on the rolls under the following circumstances: This was an action of debt upon a judgment for the sum of 1006*l*. which was composed partly of an original demand; bearing interest under an agreement between the parties, and the remainder of the money due upon simple contract. The defendant was willing to pay the sum thus mentioned, but the plaintiff refused to accept it without interest upon that part of the demand in respect of which interest was payable. The question was, whether under these circumstances the defendant was at liberty to pay the money into court without costs under the 43 Geo. 3. c. 46. s. 4?

Per Cur. With respect to the first ground of this application there appears to be no authority. The 4th section of the 43 Geo. 3. c. 46. is not compulsory on the Court, the words being "unless the Court shall otherwise order." The circumstances at present disclosed afford no ground for making such an

* So where recognizances of bail were taken in the C. P. and bail was sued in that court to judgment, but having no property, actions were brought on the judgment in K. B. in order to take their persons; costs were allowed by the Court *nunc pro tunc*; 1 Chit. Rep. 190.

order. With respect to the second point it is said, because the plaintiff is not entitled to interest on the whole of the debt, he is not entitled to interest on part. There is no rule of law that we are aware of to support this proposition. In the case of *Lee v. Lingard*, which has been cited, it does not appear that the plaintiff was entitled to go for interest, but here there is an express agreement for interest on part of the debt. The case of *Blackmoor v. Flemyng* is no authority upon this question. Unless there is some general rule established, the Court cannot see how it can accede to this motion, because if it were so, to do it would exclude the consideration of the question, whether the plaintiff is or is not entitled to interest? [704]

XVII. RELATIVE TO CONCLUSIVENESS OF A JUDGMENT IN SUBSEQUENT PROCEEDINGS FOR THE SAME CAUSE OF ACTION.*

(A) AS REGARDS THE PARTIES.

1. *BIRD v. RANDAL*. M. T; 1762. K. B. 3 Burr. 1353.

Lord Mansfield. In an action of *assumpsit*, the defendant may either plead a judgment recovered, or give it in evidence under the general issue.

2. *ASLIN v. PARKIN*. M. T. 1758. K. B. 2 Burr. 666.

This was an action of trespass for the mesne profits of a house in Sheffield, in Yorkshire, brought in the name of the lessee or nominal plaintiff in ejectment, against the tenant in possession, after judgment obtained against the casual ejector by default. The costs of the ejectment were also included and inserted in the declaration, as consequential damages of the trespass therein complained of. On the trial of this cause, the plaintiff gave in evidence the [705]

* It is a general principle that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. Hence the deposition of witnesses in another cause in proof of a fact, the verdict of a jury finding a fact, or the judgment of the Court on facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers; see *Duchess of Kingston's case*, 11 State Tr. 261. To this general rule there are some exceptions, founded upon particular reasons which will be stated hereafter. But although justice requires that third persons, who had no opportunity of examining witnesses in a suit, or of making a defence, should not be prejudiced by the verdict or judgment, it is on the other hand equally just that the parties to the suit should be subject to a different rule. From the variety of cases, said Chief Justice De Grey, in delivering his celebrated judgment in the case of the *Duchess of Kingston*, relative to judgment being given in evidence in civil suits: it seems to follow as generally true, that the judgment of a court of concurrent jurisdiction directly upon the point, is a plea, or bar, as evidence conclusive between the same parties, upon the same matter directly in question in another court; see *Duchess of Kingston's case*, 11 State Tr. 261. A party may be estopped by a verdict on record; as in an action of trespass, if the defendant prescribes for common, and the plaintiff traverses the prescription, the defendant may say that, in a former action by the plaintiff against the defendant, the same prescription was found against the plaintiff: see 1 Show. 83; *Outram v. Morewood*, 3 East, 354, 355. The authority of a former adjudication of the right prevails between the same parties; that is, between the same persons suing or sued in the same quality or character. A woman is not estopped after coverture by an admission, upon record, by her husband and herself during coverture; see Com. Dig. tit. *Estoppel*, C.; so an heir, who claims as heir of his father, shall not be estopped by an estoppel upon him as heir to his mother; so a party suing as an executor in an action of debt upon a bond will not be estopped by having been barred in an action upon the same bond when he sued as administrator; but he may show that the letters of administration have since been repealed; *Robinson's case*, 5 Rep. 32. b. So an acquittal of a person as accessory cannot be pleaded by him in bar on a charge against him as principal, for the quality and nature of the offences are quite different; 2 Hal. P. C. 244. Estoppels by verdict, admissions on record, &c. bind privies in blood (as the heir), privies in estate (as feoffee, lessee, &c.) and privies in law (as lord by escheat, tenant by courtesy, tenant in dower, the incumbent of a benefice, and others who come in by act of law in the post): in the same manner persons standing in either of these situations will be bound equally with the parties themselves by a judgment in a former action in the same matter, if pleaded in bar.

† So a record of conviction in an indictment against a plaintiff for not repairing a road will be conclusive evidence in a plea of not guilty to a second indictment of the liability of that plaintiff to repair; *Rex v. St. Pancras, Panko*, 219; see 1 Doug. 421; 2 Campb. 494.

Judgment in ejectment, the writ of possession with the return of execution upon it, the defendant's occupation of the premises, the value of them during that time (which was proved to be 20l.) and the costs of the ejectment (amounting to 12l. more.) On the part of the defendant, it was objected that as the judgment in the ejectment was by default against the casual ejector, this action could not be legally maintained in the name of the nominal plaintiff, but ought to have been brought by the plaintiff's lessor, and ought to have proved the plaintiff to have been in possession when the defendant committed the trespass for which the action is brought. Upon principle, Lord Mansfield, C. J. said he was clearly of opinion against the objection on the trial, without hearing the counsel for the plaintiff. But as authorities were then referred to, and as the point related to the effect of that proceeding which is now almost the only remedy in practice for recovering land wrongfully withheld, he thought it of great consequence that the matter should be considered by all the judges. — He therefore reserved the case, declaring he did it with that view, and that he would endeavour to get their opinion without any delay or expense to the parties. All the judges are unanimously of opinion that the nominal plaintiff and the casual ejector are judicially to be considered as the fictitious form of an action really brought by the lessor of the plaintiff against the tenant in possession, invented under the controul and power of the Court, for the advancement of justice in many respects, and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side; that the lessor of the plaintiff, and the tenant in possession, are substantially, and in truth the parties, and the only parties to the suit. The tenant in possession, must be duly served, and if he is not he has a right to set aside the judgment. If after he is duly served he does not appear, but lets judgment go by default, such judgment is carried into execution against him by a writ of possession. That there is no distinction between a judgment in ejectment upon a verdict, and a judgment by default. In the first case, the right of the plaintiff is tried and determined against the defendant, in the last case it is confessed. An action for the mesne is consequential by the lessor of the plaintiff in his own name, or in the name of the nominal lessee, and in either shape it is equally his action. This judgment, like all others, only concludes the parties, as to the subject matter of it; therefore, beyond the time laid in the demise, it proves nothing at all, because beyond that time the plaintiff has alleged no title, nor could be put to prove any. See ante, tit. Ejectment; and *Hunter v. Brekis*, 3 Campb. 455.

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So, if the defendant in an action of trespass plead his soil and freehold, and give in evidence a verdict in the same plea in a former action between the same parties, this would be evidence that the right to the soil and freehold was at the time as found. A judgment in a former ac

3. *EVELYN v. HANYES*. Cited 3 East, 365. H. T. 1806. K. B.

This was a second action for obstructing a water-course, tried before Lord Mansfield upon a plea of not guilty, and where a verdict for the plaintiff in another action brought against the defendant for another obstruction to the same water-course was given in evidence. Lord Mansfield held, that the plaintiff had not obtained such a determination of his right by the former verdict, as the law considered as conclusive. It could only be conclusive upon the right, if it could have been used, and were actually used in pleading, by way of estoppel, which it could not be in that case; 1st. Because no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel thereupon in the second action. 2ndly. It was not even pleaded by way of estoppel in the general action, but only offered as evidence on the general issue; and in order to be an estoppel, it must have been, as already observed, pleaded as such, by different averments. See *Innes v. Macferlan*, 2 Burr. 1006. 1009. abridged post. tit. Money had and received; 2 H. Bl. 414; 7 T. R. 269; 1 Esp. 279.

4. *LOCK v. NORBORNE*. M. T. 1807. K. B. 3 Mod. 142.

Upon a trial at bar in ejectment, for lands in Wiltshire, the case was thus: Mary Philpot, in the year 1078, made a settlement by lease and release to herself for life, then to trustees to support contingent remainders, then to her first, second, and third son, in tail male, and then to Thomas Arundel in tail male, with divers remainders over. It was objected at the trial that she had

no power to make such settlement, because in the year 1676, her husband had tion upon settled the lands in question upon her for life, and upon the issue of his body, the same &c. and for want of such issue, then upon George Philpot in tail male, with matter di- veral remainders over; the remainder to Mary Philpot in fee; proviso, that rectly in question, upon the tender of a guinea to George Philpot by the said Mary, the limita- is evidence tions as to him should be void; but this was not assented to by the Court; for for or a if one man has a title to several lands, and he bring ejectments against several pri- vies in defendants, and recover against one, he shall not give that verdict in evidence blood, pri- against the rest, because the party against whom that verdict was had may be vies in es- relieved against it if it is not good, but the rest cannot, though they claim un- tate, and der the same title, and all make the same defence; so if two tenants defend a privies in title in ejectment, and a verdict be had against one of them, it shall not be read law. as against the other, unless by rule of Court. But if an ancestor has a verdict well as for the heir may give it in evidence, because he is privy to it, for he who produ- or against ces a verdict must be either party or privy to it, and it shall never be received the parties against different persons, if it do not appear that they are united in interest; to the suit. [707] therefore a verdict against A. shall never be read against B; for it may hap- pen that one did not make a good defence, which the other may do.

5. *PIKE v. CROUCH*. M. T. 1700. N. P. 1 *Ld. Raym.* 730.

Per Cur. If several estates is remainder be limited in a deed, and one of ited in a the remainder-men obtains a verdict for him in an action brought against him deed, and for the same land, that verdict may be given in evidence for the subsequent one of the remainder-men, in an action brought against him for the same land, though he parties in does not claim any estate under the first remainder-man, because they all remainder obtain a claim under the same deed. verdict.*

6. *BROUNKER v. ATKYNS*. M. T. 1680. K. B. *Skin.* 15.

In this case the nonsuit against Robert Atkyns, in a former trial between So, a judg- him and Montague, the late master, was given in evidence, though the coun- ment for ot- set objected that the master comes not in punity, and that there was more gi- against the school mas- ven in evidence here than in the former trial. But ter of a hos-

Pemberton, C. J. said, that a successor comes in under his predecessor, pital con- and is like to an heir and ancestor; Speed's Chronicle was given in evidence earning the to prove the death of Isabel, Queen Dowager to Edw. 2. and though May- rights of ward seemed to oppose it, and Dolbin said it was done by consent; yet the his office, Chief Justice said, he knew not what better proof they could have; and Wal- has been lup said, that in the Lords' House it was admitted by them for good evidence admitted to be evi- in the Lord Bridgewater's case. dence for or against his succes- sors.

7. *REX v. HEDDEN*. E. T. 1699. K. B. And 388; S. C. 2 *Stra.* 1109. *Bull.* N. P. 231. 2 *Selw.* 1047.

On an information in nature of a *quo warranto* against the defendant, as So has an bailiff of Scarborough, he made title as elected under the bailiffship of Balty information and Armstrong; and upon issue joined, whether they were bailiffs or not, a re- in the na- cord of a judgment of ouster against them was read in evidence; and upon ture of a motion for a new trial, it was held that it was properly admitted in evidence, *quo war- ranto*; and a new trial was denied.

8. *GREEN v. NEW RIVER COMPANY*. E. T. 1792. K. B. 4 T. R. 590. *KIN- NERSLEY v. ORPE*. M. T. 1780. K. B. 2 *Doug.* 517. *contra.*

In an action against a master for the negligence of a servant, the latter was But this called as a witness to disprove the negligence, without a release. It was mo- rule as to ved to set aside the verdict for the rejection of the witness, contending, 1st. the conclu- That he was not interested in the event of the suit, inasmuch as the verdict siveness of judgment, could not be given in evidence in any action which the defendants might bring or evidence against him; and even admitting him to be interested, yet he was a witness or evidence from necessity, on the same grounds that coachmen and sailors are admitted in subse- to give in evidence to disprove their own negligence, in action against their quent pre- masters and employers, for damage done in their several occupations, or that ceedings, does not ex-

* So, for or against a lessee is evidence for or against a reversioner; *Rushworth v. Coun-* lead to-
dam of Pembroke, *Hard.* 472.

strangers to the original suit, except to prove a collateral fact, or the amount of damages.*

in which a servant of a tradesman is permitted to prove the delivery of goods. *Per Cur.* The last instance cited is an exception to the general rule; such a person is admitted to give evidence merely from necessity. But the exception does not extend to the two other cases mentioned of the coachman and the sailor; the verdict against the proprietors of those may be respectively given in evidence, in action to be brought by them against their servants, as to the quantum of damages, though not as to the fact of the injury. So the verdict in this case may be given in evidence, in an action by the defendants against the witness; and therefore he is an incompetent witness without a release.—Rule refused. See *ante tit. Estoppel.*

Yet, it seems, to establish a partnership between two defendants, a verdict on an issue directed out of a court of equity to try whether the defendants were partners on a bill filed by one of them against the other, is admissible evidence to prove the partnership.†

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To these rules, however, there are some exceptions; as, for instance, a judgment connected with a custom or *lex loci*; there it is as reasonable to give in evidence a verdict between the parties as to prove the payment of the duty by strangers;‡

9. *WHATELY V. MENHEIM.* T. T. 1797. K. B. 2 Esp. 608.

Assumpsit against the defendants, for goods sold and delivered, charging them as partners, with the common counts. Levy, one of the defendants, suffered judgment to go by default; Menheim, the other defendant, pleaded *non assumpsit*. The object of the present action was to establish a partnership between the two defendants, Levy and Menheim, which was admitted by the former, but denied by the latter. The cause came on to be heard in December, 1795, when the Court of Exchequer directed an issue to try this question; whether Levy or Menheim had been partners at any time, or what time? This issue was tried, and after a long trial there was a verdict found that a partnership had subsisted between Menheim and Levy, from the 29th of September, 1791, to the 22nd of January, 1793. Menheim moved for a new trial, but it was refused. The goods for which the present action was brought had been furnished to Levy on the 26th of November, 1792, during the time which it had been found by the verdict that they had been partners. In order, therefore, to establish the liability of Menheim, on the ground of a partnership, when the goods were sold, the counsel for the plaintiff offered in evidence the record of the verdict so given in the Court of Exchequer on the issue directed for the purpose, finding Menheim to be a partner with Levy, at the time of the goods sold. Lord Kenyon said he was of opinion that it was admissible and conclusive evidence of subsisting partnership at the time of the goods sold, and that it could not properly be deemed a matter *inter alios actor*, both the defendants having been parties on the record in that suit, and it having been open to Menheim on that issue, to rebut the idea of partnership by every evidence he could offer. Lord Kenyon left it, however, to the jury, who found a verdict for the plaintiff.

10. *CITY OF LONDON V. CLERKE.* T. T. 1690. K. B. Carth. 181. Bull. N. P. 233.

In an action on the case, the plaintiffs prescribed to have a farthing for every quarter of malt brought by any of the west country barges to London. Upon the general issue pleaded, there was a trial at bar, at which trial the plaintiff offered in evidence four several verdicts obtained at *Nisi Prius* against four west country malsters; and it was debated whether these verdicts should be admitted as evidence against the defendant, who was not party to those records, and—*Per Cur.* They shall be given in evidence; for it is as reasonable that a recovery against a stranger should be given in evidence as payment of the duty should be proved by strangers, which was never yet doubted. And thereupon this evidence was admitted; and

Per Holt, C. J. If a lord of a manor claims rent of his tenants *ad molendinum* by custom, &c. and in an action recovers against one tenant, that recovery may be given in evidence in a like action to be brought against other tenants, upon the reason *supra*, unless the defendant can show in any case a collusion between the parties in the first action, &c.

* Or for a stranger; *Rex v. Warden of the Fleet*, Rep. Temp.; *Holt*, 184; *S. C. Bull. N. P. 233.*

† And a verdict given in an action brought by the carrier of goods delivered to him to be carried, is evidence in an action brought by the owner against the carrier for the same goods; *Tyley v. Cowley*, Bull. N. P. 243; *Semb. S. C. 1 Ld. Raym. 744.*

‡ So, in a question of customary right of common; 1 East, 357; 5 T. R. 412,

11. *REED v. JACKSON*. E. T. 1801. K. B. 1 East, 355.

A verdict against one defendant in trespass upon an issue of a justification Or a public of a public right of way, negativing such right, was holden evidence in tres- right of pass for breaking and entering the same close against another defendant, who way; justified under the same right.

12. *THE CITY OF LONDON v. CLERKE*. H. T. 1690. K. B. Carth. 181. Case of the Manchester Mills, cited in *CORT v. BIRKBECK*. T. T. 1779. K. B. 1 Doug. 222.

Per Cur. A judgment is evidence to prove a nominal action.

Or on a ma-
norial cas-
tom;*

13. *BIDDULPH v. ATHER*. T. T. 1755. K. B. 2 Wils. 23. S. P. *MAYOR OF*

HULL v. HORNER. T. T. 1773. K. B. Cowp. 111.

Trover for a sloop, upon not guilty, was tried before Mr. Justice Wilmot at On such the last assizes for the county of Sussex. Upon a motion for a new trial, the questions, judge certified that the plaintiff's title to the sloop was, that he is lord of the therefore, manor of Lancing, in the county of Sussex, and being so, is entitled by pre- a verdict in scription to all wrecks of the sea thrown upon that manor; and that the sloop [710] an action for which this action is brought was wrecked upon that manor. And to prove between A. this prescriptive right, the plaintiff by court-rolls and parol evidence (see *Bull. and B. is v N. P. 233; 2 Stra. 1155.*) proved that the lords of the manor of Lancing idence of had taken and enjoyed wrecks thrown upon that manor from the 23rd day of the point April, 1663, until the time of bringing this action, without any interruption. — ly determin For the defendant, who is bailiff or servant to the Duke of Norfolk, and seized ed in an ac this sloop as wreck on behalf of his grace, it was insisted that the Duke of tion be Norfolk was entitled to all wrecks thrown upon any lands lying within the tween C. safe, or barony, or honour of Brambre, in the county of Sussex, and it was and D., proved that the manor of Lancing is within the hundred of Brightford, which same points lies within the safe, or barony, or honour of Brambre. It was also proved for come in is the defendant by record, that at a court of eyre, held at Chichester, in Sussex, sue, but it in the 7th year of King Edward I. Adam de Bovent claimed free chase in his is clearly manor of Rocking, and wrecks of the sea in his manor of Hoy, which liber- not conclu ties he and his ancestors had enjoyed time immemorially; and it was found by tive by the jury that he and his ancestors never had and ought to have free chase in his manor of Rocking, and that he and his ancestors never had wrecks of the sea, nor ought to have in his manor of Hoy, "eo quod domini barones de Brambre semper ibidem et alibi per totam baroniam predictam ea libertate usi fuerunt et eam habere debent," and, therefore, as to the wreck of the sea, he was amerced for his false claim. It was resolved by the whole Court, that neither these two allowances in eyre, nor the judgment in trespass, were con- clusive; and some of the judges doubted whether they were any evidence at all; but all agreed that usage for the plaintiff for ninety-two years last past, was much stronger proof of the plaintiff's right, and the whole was fit to be left to the jury; and they all said, the jury and the judge had both done right.

(B) AS TO THE SUBJECT-MATTER OF THE SUIT.

1. *HITCHIN v. CAMPBELL*. T. T. 1761. C. P. 2 Blac. Rep. 827.

This cause proceeded to trial in the sittings after T. T. 1771, on the two issues joined on the first and third pleas, when this special case was stated for the opinion of the Court: that Richard Anderson, being indebted to the de- directly up fendant Campbell in 2,000*l.* for money lent, gave two bonds and judgment for on the point the same, which judgment was entered up; and on the 9th of March, 1769, a is a bar up writ of execution sued out and delivered to the sheriff of Surrey the same day, on the same by virtue of which the sheriff the same day levied of the goods of Anderson, matter di by making a bill of sale thereof to the defendant to the value of 2,155*l.* 6*s.* 5*d.* rectly in for debt and costs. On the 9th of April, 1769, a commission of bankrupt was question in awarded against Anderson, and the plaintiff appointed assignee, who in another court; chaelmas term, 1760, brought trover in this court against the sheriff of Surrey hence a verdict for and the defendant, for the goods levied under the execution. On trial where- the defend- ant in usq

* Or in the public right of election to a parochial officer; *Berry v. Bournes, Peake*, 156.

[711] of in Hilary term, 1770, there was found a verdict for the defendant: and judgment accordingly. It was insisted that the plaintiff having made his election by bringing trover in the King's Bench, in which he failed, is barred thereby from bringing another suit for the same cause of action. It was held that where there were two different kinds of remedies, real and personal, or otherwise specifically distinguished, a man's election of one prevents him from using the other. He may distrain or bring assize, but not both, *Litt. s. 588*; his election being determined, even though he should not recover, *Co. Litt. 145*; but where both remedies are merely real or merely personal, there the election is not determined till the judgment on the merits. For a nonsuit on an action of account is no bar to an action of debt, *Co. Litt. 146*; and so must Holt in 12 Mod. 324, be understood to mean that if they bring one they shall not afterwards bring the other, i. e. if the first be brought to a due conclusion.

2. *PUTT v. ROSTER*. E. T. 1681 K. B. 2 Mod. 319; 3 Id. 98; 1 Lord Raym. 472.

And a judgment in trespass when the right of property is determined will be a bar in trover for the same taking.*

Trespass for taking of his cattle. The defendant justifies for a heriot; and upon a demurrer, had judgment. The plaintiff afterwards brought an action of trover and conversion for the same cattle. The defendant pleaded the former judgment in trespass in bar to this action of trover; and the plaintiff demurred. The Court were of opinion that an action of trover doth lie where a trespass doth not; and if the plaintiff hath mistaken his action, that shall be no bar to him. As to the case put of the mayhem' that doth not agree with this, because there can be no mayhem without an assault, but there may be a trover without a trespass; and though the appeal of mayhem be of a higher nature than the assault, because it doth suppose *quod feloniam mayhemiarit*, yet the plaintiff can only recover damages in both. If a man bring trespass for taking of a horse, and is bound in that action, yet if he can get the horse in his possession, the defendant in the trespass can have no remedy, because notwithstanding such recovery, the property is still in the plaintiff. The defendant in this case hath justified the taking of the cattle for a heriot, and by the demurrer the justification is confessed to be true in fact. Now by the taking for a heriot, the property of the goods was altered, and wherever the property is determined in trespass an action of trover will never lie for the same. But it is a good plea in bar.

3. *SEDDON v. TUTOR*. E. T. 1796. K. B. 6 T. R. 607.

If the plaintiff, on the trial of his action at tempted to prove a demand against the defendant, and failed, he cannot set it up again on a second action; but if he omitted to give any evidence of the demand on a former occasion, though he

Assumpsit for goods sold and delivered. Plea, a former recovery. It appeared that in the former action, in which the defendant suffered judgment to go by default, there was a count on a promissory note for 75*l.*, and counts for goods sold and delivered, there being at that time 257*l.* due for goods; but on executing the writ of inquiry, the plaintiffs only being prepared with proof of the note, they took a verdict for that, which with the costs amounted to 71*l.* 10*s.* Afterwards on an application to the defendant for the 25*l.* 7*s.*, he refused to pay, on which the present action was brought. It was objected on behalf of the defendant that as the plaintiffs might have recovered this sum in the former action, they ought not to be permitted to bring this, a second action, for the same demand. *Per Cur.* It is admitted that the plaintiff had two demands against the defendant, the one on a promissory note, the other for goods sold; that on executing the writ of inquiry in the former action, evidence was only given on the first demand; that the plaintiffs recovered damages adapted to that demand, and that the other demand for the goods still remains unsatisfied. By alluding to the pleadings in this action' it will also be found that the plaintiffs are right in point of form. The issue was, whether the damages demanded in this action have been already satisfied by the recovery in the former action; and most clearly they have not. The case of *Markham v Middleton*, 2 Sira.

* So a judgment in an action of debt is a bar in assumpsit on the same contract; *Slade's case*, 4 Rep. 94. One great criterion for trying whether the matter or cause of action be the same is, that the same evidence will maintain both the actions; but where the plaintiff failed in his first suit, or out of some defect in pleading, or from having mistaken the form of action, the judgment will not be conclusive, and he may bring another action to try the same right. 5 Rep. 33; 6 Id. 8; S. C. Com. Dig. tit. Action, L. 4.

1259: is extremely different from the present. There the plaintiff had but one demand, and there the jury gave inadequate damages for that demand on account of the plaintiffs not being prepared with proof of his whole bill; he would have been barred by that verdict if it had stood; but in this case there were two distinct demands, not in the least blended; and though the plaintiffs might in the first action have proved this demand, owing to an inadvertence they did not; and the recovery on the note in that action is no bar to their demand in this, which is for goods. In truth, this is a question of great delicacy; we must take care not to tempt persons to try experiments in one action, and when they fail to suffer them to bring other actions for the same demand. The plaintiff who brings a second action ought not to leave it to nice investigation, to see whether the two causes of action be the same; he ought to show beyond all controversy, that the second is a different cause of action from the first in which he failed. In this case it is clearly shown that this demand was not inquired into in the former action. And we are glad that we are borne out by the form of the issue to decide with the justice of the case.

XVIII. RELATIVE TO FOREIGN JUDGMENTS.

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(A) EFFECT OF.

1. *POWER v. WHITMORE*. E. T. 1815. K. B. 4 M. & S. 141. S. P. GEYER v. AGUILAR. T. T. 1798. K. B. 7 T. R. 681.

Per Cur. Although by the comity which is paid by us to the judgment of other courts abroad of competent jurisdiction, we give a full and binding effect to such judgments, as far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate, yet we feel that we should carry that principle of comity fur-

The laws of England pay such respect to foreign courts as to consider their judgment binding as between the parties to the suit in which it is.

So, with regard to an award made on a reference of all matters in difference between the parties it is no bar to any cause of action which the plaintiff had against the defendant at the time of the reference, if it appear that the subject-matter of the action was inquired into before the arbitrators; 4 T. R. 146; 4 Esp. 180; 2 East, 165. A judgment in one action of ejectment is not conclusive in another, in consequence of the fictitious nature of the proceedings. However, it is conclusive evidence of the plaintiff's title against the tenant in possession in an action for mesne profits; for the plaintiff, to entitle himself to recover in an ejectment, must show a possessory right, not barred by the statute of limitations. This judgment, like all others, only concludes the parties as to the subject-matter. It proves nothing beyond the time-laid in the demise; because beyond that time the plaintiff has alleged no title nor could be put to prove any. As to the length of time also which the tenant has occupied or as to the notice, the judgment proves nothing, for the same reason; *Costine v. Parker*, 2 Burr 668; 3 Campb. 455. There is a difference, it has been said, between real actions and personal actions, as to the conclusiveness of a judgment. In a personal action, as debt account, &c. the bar is perpetual; for the plaintiff cannot have an action of a higher nature and has no remedy but by error or attain; see 1st resol. *Ferrer's case*, 6 Rep. 7. But, if the plaintiff be barred in a real action by judgment on a verdict, demurrer, confessions &c., yet he may have an action of a higher nature, and try the same right again, because it concerns the freehold and inheritance; see *Outram v. Morewood*, 3 East 359. Now, although it is true that the same matter may be thus tried again, yet the former judgment is no less conclusive upon the immediate right then in demand, as far as that former judgment purports to be laid, and against all such persons, as it is competent by law to bind; see 3 East, 354. A judgment is final for its own proper purpose and object, and no further. A recovery in any suit upon issue joined in matter of title, is conclusive upon the subject-matter. Thus, a finding upon title in trespasses not only operates as a bar to the future recovery of damages for a trespass founded upon the same injury, but operates also as an estoppel to any action for an injury to the same supposed right of possession.

† The sentence of any foreign court of competent jurisdiction, directly deciding a question which was properly cognizable by the law of the country, seems to be conclusive here if the same question arise incidentally between the same parties in this country. Thus, the sentence of a foreign court of competent jurisdiction directly establishing a marriage in that country, would be conclusive in any of our courts on the validity of the marriage; see *Lord Hardwicke*, in *Roach v. Garvan*, 1 Ves. 159. So, where a party, having accepted a bill of exchange draws upon him at Leghorn, instituted a suit there, in which suit his acceptance was vacated, and upon his return to this country, being sued again on his acceptance, applied to the Court of Chancery for an injunction and relief against the second, Lord Chancellor King decided, that the cause was to be determined by the law of the country where the bill was negotiated; and as the acceptance had there been declared void by a competent jurisdiction, he thought the sentence must here also be conclusive; see *Burrows v. Leming*, 2 Stra. 738.

given, but not as between strangers.

So, in a criminal charge, as for murder committed in a foreign country an acquittal in that country might be pleaded here in bar to an indictment for the same offence.

If an action be brought in this country upon a foreign judgment, the sentence has been considered *prima facie* evidence of the debt, but not conclusive. But altho' a foreign judgment is only *prima facie* evidence of a debt, for which the suit abroad was instituted, yet for many purposes it will be conclusive between the parties according to the nature of the subject-matter and the purposes to which the evidence is applied; Provided nothing appear upon the record of proceed

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ings on which the judgment is founded, contrary to reason and justice.

ther than reasonably ought to be done, or ever hitherto has in practice been done, if we should draw from the recital of facts and usages which are contained in those judgments, general evidence of the existence of such facts and usages, and allow them to be available for all causes and purposes and consider them as applicable to, and obligatory upon, other persons than the immediate parties to those judgments.

2. HUTCHINSON'S CASE. E. T. 1688. K. B. Cited 1 Show, Rep. 6; S. C. 2 Stra. 733. S. P. ROCHE'S CASE. 1 Leach C. L. 160.

Hutchinson was accused and acquitted in Spain for killing a man there.—It was held to be a good bar to any proceedings here; and the court took a distinction between this and the case of Hughes v. Cornelius; see Raym. 473, Skin. 59; and Cottingham's case; see 2 Roll. Abr. 83; Cro. Car. 506.

3. WALKER V. WITTER. T. T. 1778. K. B. 1 Doug. 1. GALBRAETH V. NEVILLE. M. T. 1778. K. B. 1 Doug. 5; S. C. 5 East, 475. D. PHILIPS V. HUNTER. 2 H. Bl. 410. In error, *semb. contra*.

Per Cur. Crawford v. Whittall, H. 13 Geo. 3. B. R. decided that *indemnitas assumptis* may be maintained on a foreign judgment. And also determined that the judgment is of itself *prima facie* evidence of the debt, and therefore, the plaintiff is not bound to show any other consideration.

4. TARLETON V. TARLETON. E. T. 1815. K. B. 4 M. & S. 21. S. P. MOLONY V. GIBBONS. M. T. 1810. N. P. 2 Campb. 502.

In covenant to indemnify plaintiff from all debts due from the late partnership of plaintiff and defendant and D. B., and from all suits, &c., proof on a copy of proceedings in a foreign court in a suit there instituted against the late partners for the recovery of a partnership debt, in which a decree passed against them for want of answer *per quod*, a sequestration issued against the plaintiff's estate, and he was obliged to pay the debt, &c. It was moved for a new trial, upon the ground that the proceedings in the foreign court were not conclusive evidence. The counsel said that where a foreign judgment is a subject-matter of a suit in this court, it was but *prima facie* evidence, and the defendant might object to the judgment.

Lord Ellenborough, C. J. I thought that I did not sit at Nisi Prius to try a writ of error in this case upon the proceedings in the court abroad. The defendant had notice of the proceedings, and should have appeared and made his defence. The plaintiff by this neglect has been obliged to pay the money in order to avoid a sequestration.

5. BUCHANAN V. RUCKER. H. T. 1808. K. B. 9 East, 192; 1 Campb. 63. The plaintiff declared in *assumpsit* for 2,000*l.* on a foreign judgment of the Island Court in Tobago, and produced a copy of the proceedings and judgment, certified under the hand-writing of the chief justice and the seal of the island, which were proved; which, after containing an entry of the declaration, set out a summons to the defendant, therein described as formerly of the city of Dunkirk, and now of the city of London, merchant to appear at the ensuing court to answer the plaintiff's action, which summons was returned, served, &c., by nailing up a copy of the declaration at the court house door, &c., on which judgment was afterwards given by default; whereupon it was objected, that the judgment was obtained against the defendant, who never appeared to have been within the limits of the island, nor to have had any attorney there, nor to have been in any way subject to the jurisdiction of the court at the time, and was therefore a nullity. And of this opinion was Lord Ellenborough, though it was alleged (of which, however there was no other than parol proof) that this mode of summoning absentees was warranted by a law of the island, and was commonly practised there; and the plaintiff was thereupon nonsuited.

Per Cur. Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?—The law itself, however fairly construed, does not warrant such an inference; for absence from the island must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the court out of

which the process issued; and as nothing of that sort was in proof here, to show that the defendant was subject to the jurisdiction at the time of commencing the suit there is no foundation for raising an *assumpsit* in law upon the judgment so obtained.

(B) ACTIONS ON.*

1. HALL V. ODBER. E. T. 1809. K. B. 11 East, 118. S. P. ANON. M. T. 1797. K. B. Loft, 150 *contra*.

In support of an *assumpsit*, by evidence of a foreign judgment, recovered by the plaintiff for the same sum, with a stay of execution for six months, to enable the defendant to prove a counter demand, if he and the plaintiff not having declared till after that period. *Per Cur.* The plaintiff proved a settled account here between him and the defendant, by which the latter acknowledging to be indebted to him so much on the balance. He also proved a judgment recovered in a foreign court for this sum against the defendant; that was a confirmation of the account settled. But it appeared that the defendant in that suit had made a counter demand, and the Court there suspended the execution of the judgment given for the plaintiff for a certain time, to give the defendant an opportunity of establishing, if he could, a cross-demand. But this being only a foreign judgment, did not extinguish or merge the plaintiff's simple contract debt, which can only be done by converting it into a debt of a higher nature. It is only evidence of the debt, and no answer has been given to it on the part of the defendant. *Postea* to the plaintiff.

2. SADLER V. ROBINS H. T. 1808. N. P. 1 Campb. 253.

Assumpsit on a decree of a foreign court, whereby the defendant is ordered to pay a certain sum of money to the plaintiff on a certain day, first deducting thereout the defendant's costs, to be taxed by the proper officer. The defendant's costs have not been taxed, either at his own request or upon an *ex-parte* proceeding at the instance of the plaintiff.

Lord Ellenborough expressed himself of opinion that the action was not maintainable, as it did not appear what sum was actually due; the plaintiff, according to the terms of the decree, deducting thereout the full costs of the said defendant, is the same as the full costs of the said defendant first being deducted thereout; and if the defendant did not appear to tax the costs, the plaintiff might have proceeded *ex-parte*. At present, the sum due on the decree is quite indefinite; the operations to ascertain it should have taken place in the Court of Chancery in Jamaica, and cannot be gone through here at the *Nisi Prius*. Had the decree been perfected, I would have given effect to it, as well as to judgment at common law. The one may be the consideration for an *assumpsit* equally with the other; but the law implies a promise to pay a definite, not an indefinite sum. [716]

3. WALKER V. WILTON. M. T. 1778. K. B. Doug. 1.

A foreign judgment was called a record. The Court held, as to the point and the lat that the judgment is not a record, and that the defendant must have judgment on the pleas of *nul tiel record*, there is no foundation for it, because it is stated to be a judgment of a court in Jamaica; as such it is to be tried by the country (as it might have been in this case on the *nul debet*), and not by the court.—The *prout palet per recordum* in the declaration is absurd, and may be rejected; and the plea of *nul tiel record* is a mere nullity. The plaintiffs have done right to state the judgment in the manner they have done, because that is matter of description. Judgment for the plaintiffs.

4. CRAWFORD V. WHITAL. M. T. 1778. K. B. Doug. 4. CRAWFORD V. WETTER. H. T. 1772. K. B. Loft. 154. HENLY V. ACKEY. H. T. 1803. K. B. 3 East, 221.

This was an action of *indebitatus assumpsit*, brought by Crawford as administrator of one Hargrave, in which he declared that the defendant was indebted to him as administrator in the sum of 747l. sterling, for 6904 rupees, ten annas, the judg-

* An action lies upon the decree of a colonial court of equity for the balance of an account between partners, Henly v. Soper, 2 M. & R. 152; even without any proof that the defendant was within the jurisdiction of the Court; 2 Campb. 502.

ment of a foreign court, with out declaring upon or proving the grounds and cause of action on which the judgment went. and nine pieces of current money of Bengal, in the East Indies, by a certain judgment of the honourable the Mayor's Court, at Calcutta, at Fort William, in Bengal, aforesaid, holden before, &c., before that time, viz. on, &c., adjudged and awarded to be paid by the said defendant to the said plaintiff, as administrator as aforesaid, for a certain demand of the said plaintiff, as administrator as aforesaid, sued and prosecuted in the same court, of 5801 rupees, and, together with interest due thereon from and till, &c. at the rate of, &c. being, &c. current money of Bengal, aforesaid, and costs of suit, being, &c. making together the said sum of 6904 rupees; &c., which said judgment is in force and unsatisfied; and which said 6904 rupees, &c., at the time of recovering the said judgment, were, and yet are, of the value of the said 7471; and being so indebted, the defendant afterwards, in consideration of the premises, undertook to pay. There were other counts to the like effect, some of them stating the sum only in East India money, some varying the amount, and some stating the judgment, without adding, for a certain demand, &c. The Court held that the action will lay, and that the plaintiff was entitled to recover.

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(C) PROOF OF.

1. HENRY V. ADEY. H. T. 1803. K. B. 3 East. 221. BUCHANAN V. RUCKER. M. T. 1807. N. B. 1 Campb. 63. FLINDT V. ATKINS. H. T. 1811. N. P. 3 Id. 215. ALVES V. BUNBURY. T. T. 1814. N. P. 4 Id. 28.

In an action upon the judgment of a foreign country, the sentence must be proved.*

In an action upon a judgment obtained in the island of Grenada, the plaintiff, at the trial before Lord Ellenborough, C. J. proved the hand-writing of the judge of the court, subscribed to the instrument purporting to be the judgment of the court, but could not prove that the seal affixed to it was the seal of the island, for want of which proof the plaintiff was nonsuited. The Court held the nonsuit proper, for defect of the proof of the seal. They said that they could not take judicial notice that the seal affixed was the seal of the island, which was necessary to be shown, in order to prove the judgment which it purported to authenticate; that proving the judge's hand-writing could not advance the proof of the seal, by considering him in the nature of a witness to it, which was not pretended.

2. BUCHANAN V. RUCKER. M. T. 1807. N. P. 1 Campb. 63.

In one case a judgment was proved by a witness swearing to the hand-writing of the Chief Justice of the court, and saying he would have acted upon the seal appended to it as the seal of the Court.

Assumpsit on a judgment of the Court of Common Pleas, in the island of Tobago, for 2,030*l.* 3*s.* 3*d.* currency, alleged in the declaration to be of the value of 2,000*l.* sterling, with the common money counts. Plea, *non assumpsit*. The judgment being proved, by a witness swearing to the hand-writing of E. Pigott, esq. the Chief Justice of the court, and saying that he would have acted upon the seal appended to it as the seal of the island;

Lord Ellenborough. "A foreigner, or a subject who is abroad, may be outlawed here, and his effects, if he has any in the country, may be seized under the outlawry; but it is impossible for the plaintiff to recover a judgment against him, when he has never appeared to the action. The defendant not being resident in Tobago, there was no pretence for suing him in the courts of that colony." In answer to an observation from the plaintiff's counsel that the judgment or sentence of a foreign court must be received as evidence of the right it establishes, and must at any rate be taken as just and regular, till the contrary is shown by extrinsic proof; his lordship said, there might be such a glaring injustice on the face of a foreign judgment, or it might be so erroneous as to render it so ludicrous that it could not raise an *assumpsit*; and if submitted to the jurisdiction of the Courts of this country, could not be enforced, fore directed a nonsuit.

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A copy of judgment purporting to be signed by the clerk of the

3. APPLETON V. BRAYBROOK. M. T. 1814. N. P. 2 Stark. 6.

This was an action against the defendant upon a judgment recovered in the court of the island of Jamaica. The principal question was, whether the judgment had been properly authenticated. It was proposed to authenticate the judgment in the following manner: 1st. To show by certificate from the go-

* If the Court possess a seal, it must be used for the purpose of authenticating a judgment, although it be too much worn to make an impression; *Cavan v. Stewart*, 1 Campb. 528.

vernor, under the great seal of the island, that Clayton was a notary public court, and a secretary of the island. 2ndly. To prove by a certificate of Clayton's, certified by the notary public, that Smith was clerk of the supreme court. 3rdly. By producing an instrument, which purported to be a copy of a judgment under the hand of the chief clerk. A witness of the name of Allen proved that he had practised as an attorney on the island many years, and that the Court had no seal, but that copies of the judgment on stamps were usually received, certified to be true copies by Smith, the chief clerk. But he could not state whether the document produced was in the hand-writing of Smith, or of one of his clerks. Lord Ellenborough permitted the plaintiff to take a verdict, with liberty to the defendant to have a nonsuit entered.

4. ADAMTHWAITE v. SINGE. H. T. 1816. N. P. 1 Stark. 183; S. C. 4 Camb. 372.

The witness called to prove an examined copy of the judgment stated, that at the request of an attorney in Dublin he went to the building where the four courts are held, and there compared the copy, and produced a parchment roll from the custody of the attorney. Lord Ellenborough. Since the records are kept in different presses, the same difficulty still presents itself; it is very distressing to strain the rules of law, when evidence might so easily be procured. If the witness had stated that the record came out of the hands of the proper officer, it would have been sufficient. The evidence must be launched by proving that the document came either from the proper person or proper place; till then I cannot look upon it as a record. To admit this evidence would afford a precedent for laxity of proof in other cases. See Vent, 257; Gilb. Ev. 13.

Judgment in Criminal Proceedings.* See also tit. Execution.

1. REX v. HOLT. M. T. 1793. K. B. 5 T. R. 445.

Per Cur. After trial all that defendant can do is to move an arrest of judgment, which may be done at any time before judgment is pronounced.

2. SURTON v. BISHOP. H. T. 1769. 4 Burr. 2287. TRUSCOTT v. CARPENTER. T. T. 1696. K. B. 1 Ld. Raym. 231.

Per Cur. There was no pretence to arrest the judgment; because nothing appears on the face of the record to justify it; and the Court ought not to arrest judgment upon matters not appearing upon the face of the record.

3. REGINA v. DREMAN. H. T. 1705. K. B. 2 Ld. Raym. 1221.

The defendant was indicted for perjury, and the indictment set forth a trial had before the Lord Chief Baron, at Nisi Prius in Middlesex; and the defendant being sworn before the Lord Chief Baron upon the holy evangelists, deposed so and so, which was false, *et sic* the defendant *commisit voluntarium perjurium, coram* the Lord Chief Baron; judgment was given against the defendant by *nihil dicit*, and now the defendant appearing in court, the counsel moved the Court in his behalf in arrest of judgment; and it being doubted whether he were not too late—Holt, C. J., said, that after judgment by *nihil dicit* judgment has been arrested, but never after judgment upon de-

4. REX v. SPRAGG. H. T. 1760. K. B. 2 Burr. 730. DOMINUS v. HAYES. T. T. 1729. K. B. 2 Stra. 844.

Per Cur. No application in arrest of judgment can be made in defendant's absence.

* As to by whom, the time and manner of giving judgment, see *ante*, vol. 10. tit. Indictment.

1 The causes on which this motion may be grounded, although numerous, are confined to objections which arise upon the face of the record itself; therefore no defect in evidence or improper conduct on the trial, can be urged in this stage of the proceedings; 4 Burr. 2287; 1 Ld. Raym. 231; 1 Salk. 77. 315; 1 Sid. 65; Com. Dig. Indictment, N. Thus it is no ground of arrest of judgment that the sheriff by whom the panel was returned is the prosecutor, however strong a reason it would have been of challenge; 1 Lench, 101. But any want of sufficient certainty in the indictment respecting the time, place, or offence which

him, accompanied by a notary public, certified the original certificate of the governor, under the seal of the island, and was held inadmissible. It must, however, in all cases be proved that the original came from the proper place of deposit, or out of the hands of the officer in whose custody the records were kept. Motion in arrest of judgment may be [719] For any objection which appears on the face of the record making the proceedings apparently erroneous; No motion in arrest of judgment can be made after judgment against defendant on demurrer; Nor can an application of this description be made in de-

5. **REX v. NICOLLS.** E. T. 1744. K. B. 2 Stra. 1227. **REX v. LIVERPOOL,**
MAYOR OF. H. T. 1760. K. B. 2 Burr. 731.

Unless the jury find a verdict in which they submit a question to the Court.

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Prisoner was indicted at Hicks's Hall, for conspiring with Edward Bygrave, unjustly to charge William Frankland with a robbery, and for that purpose going before a justice of peace, where Bygrave swore it upon him. Nicholas only came in and pleaded not guilty, and the jury found that she was guilty; but Bygrave died before the indictment was preferred. Before any judgment was given at the sessions, she brought a *certiorari*, and the cause was set down to be argued. The first thing determined was, that this being in the nature of a special verdict, there was no occasion for the defendant appearing in court upon the argument; for she is not considered as convicted till after the Court have determined upon the verdict. And it was therefore not within the reason of the case of moving for a new trial or in arrest of judgment, where there being a general verdict, it created such a presumption of guilt, that the party cannot move without being present in court.

9. **KING v. WRIGHT.** E. T. 1805. K. B. 6 East, 328. **S. P. PRICE v. JACKSON.** E. T. 1813. K. B. 1 M. & S. 442.

In cases of misdemeanour the Court may reverse the judgment passed before it be comes matter of record, and may either mitigate or make it more so here.

Upon an indictment for perjury, in falsely taking the freeholder's oath at an election of a knight of the shire in the name of J. W. it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election by the name of J. W., who swore to his freehold and place of abode, and that there was no such person; and that the defendant voted on the second day, and was no freeholder; and sometime afterwards boasted that he had done the trick, and was not paid enough for the job, and was afraid that he should be pulled for his bad vote; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name or in any other than the name of J. W.; the jury found a verdict of guilty against the defendant according to the particular terms in which the charge was made upon him by this indictment.

Lord Ellenborough, C. J. stated the reason to be for the purpose of passing upon them a different judgment (which he observed might be done at any time the same term,) the former judgment being, in their opinion, improper, upon the grounds above alleged, and which were stated by his lordship.

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Jurisdiction.

is material to support the charge, as well as the circumstance of no offence being charged, will cause the judgment to be arrested; 4 Bla. Com. 375; 3 Burr. 1901; 1 East, 146.

* If the defendant is in actual custody he must apply for a *habeas corpus* to enable him, on being brought up, to make the motion; 2 Burr. 931. Where an application of this kind is made at the assizes; and the judge thinks it is open for discussion, the sentence is respited in order to take the opinion of the twelve judges; 1 Leach, 360; 25 Geo. 2. c. 37, s. 3. 4; 1 Leach, 101; 2 Leach, 1104. If the judge thinks that the objections are not well founded, he then passes sentence; but he may nevertheless respite execution, in order to take the opinion of the judges upon the objections; 2 Leach, 102, 106, 107. If the judgment is ultimately arrested, all the proceedings will be set aside, and judgment of acquittal will be given, but it will be no bar to a subsequent indictment, which the prosecutor may immediately prefer; see 3 P. Wms. 439; 4 Co. 45; Com. Dig. Indictment, N.; 4 Bla. Com. 375.

† And the justices at sessions have the same power during the session, because it is regarded as only one day; but they cannot do it at any subsequent period, unless an adjournment be entered on the roll; see 2 Salk. 606; Bac. Abr. Court Session; Dick. Sem. 18, 14, 376. b. And no Court can make any alteration when once the judgment is solemnly entered on the record; but if any material defect appear on the face of it, the judgment may be reversed by writ of error; 4 Mod. 395. So, the Court of King's Bench will not mitigate, though they may set aside, a fine imposed by an inferior court, on the removal of proceedings by *certiorari* thither; 8 T. R. 616. But the defendant, if oppressed, may obtain a remedy by petition to the Lords Commissioners of the Treasury, who will refer it to the Attorney General, and if his report be favourable, will allow such mitigation as they think the case requires; 8 T. R. 618. d. After judgment for a libel the court will not, on the motion of the defendant, make an order on the prosecutor to deliver up the originals of the libellous matter, to be retained in the custody of an officer; see 2 East, 1861.

1. *SMART v. WOLFF*. T. T. 1789. K. B. 3 T. R. 343.

Ashurst, J. It is certainly a general rule, that where a Court has jurisdiction in the principal question, it has jurisdiction incidentally over all interlocutory matters connected with the original cause.

Whenever a jurisdiction vests as to the principal

question, it applies to all incidental points connected with it.

2. *MACBETH v. HALDIMAND*. E. T. 1786. K. B. 1 T. R. 172.

Per Cur. There was no other evidence but letters, which were before the jury, and the judge had a right to give his opinion upon them. The construction of deeds is a matter of law, but that of letters is proper for the consideration of the jury.

And the jury must follow the judge's opinion as to the import of a written document; but a question of intention is a matter of fact; so may fraud be though it may also form a point of law, and sometimes law and fact.

3. *KING v. GILLHAM*. E. T. 1795. K. B. 6 T. R. 265.

On an indictment on the 17 Geo. 8. c. 26. s. 7. for taking more than 10s. in the 100l. for brokerage, &c., *Grose, J.*, said, in cases of this kind, the question must be left to the jury to consider whether the defendant really took more than 10s. in 100l. by way of brokerage; for if he colourably take a large sum under pretence that the excess above 10s. was received for another purpose, that will not avail him. In the case of usury, it is always left to the jury to say whether the sum taken, though ostensibly for another purpose, was not in reality taken as usurious interest.

Se may fraud be though it may also form a point of law, and sometimes law and fact. The word "reasonably" is a term of law, Unless it be applied to time, when it is a question of fact. But what is reasonable or probable cause is a question of law;

4. *ESTWICK v. CAILLAUD*. M. T. 1793. K. B. 5 T. R. 420.

Per Cur. Fraud may be a question for the jury, and it may also form a part of law, and sometimes, law and fact.

5. *METCALF v. HALL*. E. T. 1786. K. B. 1 T. R. 169.

The Court considering the reasonableness of time as a question of law, and not of fact, whether the post goes out this or that day, at what time, &c., are matters of fact; but when those facts are established, it then becomes a question of law on those facts what notice shall be reasonable.

6. *MUILLMAN v. D'EGUINO*. M. T. 1795. C. P. 2 H. Bl. 565.

Per Cur. What is reasonable time must depend on the particular circumstances of the case, and it must always be for the jury to determine whether any laches is imputable to the plaintiff.

7. *JOHNSTONE v. SUTTON*. M. T. 1786. K. B. 1 T. R. 520.

An action for maliciously, and without any reasonable, or probable cause, holding the plaintiff to bail, was tried before *Buller, J.*, who stated to the jury that there were two questions to be determined; 1st. Whether the facts in evidence were true. 2nd. Whether, if true, they showed a want of reasonable or probable cause; and the learned judge added, "what is reasonable or probable cause is matter of law," and he then gave his opinion upon the case.

law, and sometimes law and fact. The word "reasonably" is a term of law, Unless it be applied to time, when it is a question of fact. But what is reasonable or probable cause is a question of law;

8. *JOHNSTONE v. SUTTON*. M. T. 1786. K. B. 3 T. R. 545, 784.

Per Cur. The question of probable cause is a mixed proportion of law and fact. Whether the circumstances alleged to show it probable or not probable are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law; and upon this distinction proceeded the case of *Reynolds v. Kennedy*, 1 Wils. 232.

[722] though under circumstances, it may be a mixed proportion of law and fact. Submitting to a jurisdiction precludes the right of questioning it.

9. *WILSON v. HOBDAY*. E. T. 1815. K. B. 2 M. & S. 120.

Per Cur. Submitting to a jurisdiction precludes the right of questioning it.

distinction precludes the right of questioning it.

10. *MOSTYN v. FABRIGAS*. M. T. 1774. K. B. Cowp. 172.

Per Cur. If the party means to dispute the jurisdiction, it must be by plea.

If the party means to dispute the jurisdiction by plea;

* Where an indictment is taken before a Court that hath no cognizance of the offence the defendant may plead to the jurisdiction, without answering at all to the crime alleged, it must be 2 Holt. 286; as if a man be indicted for treason at the quarter sessions, for a rape at the sheriff's town, or the like, Id.; or if another court have exclusive jurisdiction of the offence. But although the defendant may plead to the jurisdiction in such case, there are but few instances in which he is obliged to have recourse to such a plea. If the offence were committed out of the jurisdiction of the court, the defendant may take advantage of this matter under the general issue, 6 East, 583; or if the objection appear upon the face of the record, he may demur, or (it should seem) move in arrest of judgment, or bring a writ of error. If, on the other hand, the offence were committed within the jurisdiction

11. PARKER v. ELDING. E. T. 1801. K. B. 1 East, 352.

Except where a statute directs that the proceedings shall be taken in a particular court; then if the action be brought elsewhere, the statute may be given in evidence under the general issue.

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To *assumpsit*, the defence as to so much was, that the debt was contracted within the Isle of Ely, by the defendant residing there, where the plaintiff also lived at that time (though the latter had removed at the time of the action commenced); and that by the stat. 13 Geo. 3. c. 36. (directed to be deemed a public act) for the more easy and speedy recovery of small debts contracted within the Isle of Ely, a court of requests is constituted, and it is enacted, "That no action or suit for any debt not amounting to 40s., and recoverable by virtue of this act in the said court of requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any of the King's courts of Westminster, &c., or elsewhere, out of the said court of requests." In reply, it was urged on the part of the plaintiff at the trial, that, admitting that the above mentioned clause was strong enough to draw the subject matter of the action within the inferior jurisdiction, because the defendant resided there, although the plaintiff did not, which was contrary to the usual rule in such cases, more especially as a subsequent clause gave treble costs against the plaintiff, in case he was nonsuited, or a verdict passed against him. a provision which seemed to imply that he also must reside within the jurisdiction; yet at any rate, such an objection to the jurisdiction could not be taken on the general issue, but ought to have been specially pleaded; for otherwise it is a surprise upon the plaintiff, as he might not know that the defendant lived within the peculiar jurisdiction at the time of the contract made. The learned judge, however, thought the objection to the action well founded, and a verdict was taken for the defendant, with liberty to the plaintiff to move to set it aside, and enter a verdict for the 11. 18s. If the Court should be of a different opinion. Lord Kenyon, C. J. Some acts of parliament, giving a peculiar jurisdiction, require that it shall be pleaded in case the parties claiming the privilege shall be sued elsewhere; and others direct that a suggestion shall be entered on the roll, and in those cases the methods pointed out by the respective statutes must be pursued. But here is a general law of which we are bound to take notice, which says, that no action shall be brought against any person residing within the jurisdiction, for any debt not amounting to 40s. and recoverable by virtue of that act. The demand in question is of that sort. How then can we say that the plaintiff shall recover it against the positive direction of the act? This being directed to be taken as a public act is part of the general law of the land, of which the plaintiff must be deemed to have notice, and therefore cannot object to being surprised. He must also know, in fact, with whom he contracted, and on what account.

12. MOSTYN v. EABRIGAS. M. T. 1774 K. B. Cowp. 172.

A plea to the jurisdiction must show the proper tribunal; And may begin with the words "defend the wrong and injury, when, &c."

[724] When pleaded, it must be in person, and not by attorney.

Per Cur. In every plea to the jurisdiction, you must state another jurisdiction; therefore, if an action is brought here for a matter arising in Wales, to bar the remedy sought in this court, you must show the jurisdiction of Wales; and in every case to repel the jurisdiction of the King's court, you must show a more proper and more sufficient jurisdiction; for if there is no other mode of trial, that above will give the King's court a jurisdiction. Now in this case, no other jurisdiction is shown, even so much as in argument.

13. WILKES v. WILLIAMS. T. T. 1808. K. B. 6 T. R. 631.

The court held that a plea to jurisdiction might begin with the words "defend the wrong and injury, when, &c."

14. GRANT v. SONDES. E. T. 1775. C. P. 2 Blac. 1094.

Per Cur. There is no difficulty in this case. Every dilatory plea is held strictly to certain rules. They must be offered in the first instance, and pleaded without any repugnancy. They cannot be pleaded after a general impar- of the court, but the Court have not cognizance of it (which can occur only in the case of indictments in inferior courts; such as the court of quarter sessions). the defendant may have advantage of it upon general demurrer. 1 T. R. 316; or the Court of King's Bench, upon the indictment being removed by *certiorari*, will quash it, 2 Stra. 1088; or the court where the indictment is preferred will in general give the defendant the advantage of the objection at the trial, under the general issue. As pleas to the jurisdiction, therefore, seldom occur, it is not necessary to treat of them at any length.

lance, because, when you ask a favour, and gain time, you admit all before to be right. To avoid the injustice that might sometimes happen by adhering too strictly to this rule, two special manners of imparlance are allowed, there being three kinds of imparlances in all. The first sort of special imparlance saves to the defendant the right of excepting to the writ and count, and these are granted of course upon application at the office. The other sort of special imparlance which saves all manner of exceptions, and among the rest the exception to jurisdiction, is discretionary. It must depend on particular circumstances, which are left to the decision of the Court.

15. *PHILLIPS v. BURY*. E. T. 1788. K. B. 2 T. R. 357.

The Court held that in all cases an excess of jurisdiction might be remedied.

16. *REX v. MUNTON*. M. T. 1793. N. P. 1 Esp. 62.

This was an information filed by the Attorney-General against the defendant, who was the principal store-keeper at Antigua in the West Indies, for several misdemeanours. The principal charge upon which the information was founded was, that he had purchased in England certain stores of Whitehead and Co., at a certain nominal price, agreed upon between them, which price he charged to government in his returns to the Navy-Office; and that, by collusion between him and Whitehead and Co., the latter had made to him a considerable allowance in such nominal price, which allowance he reserved to his own use, by which government were defrauded to a large amount. The defendant then took an objection to the jurisdiction of the Court, and insisted that it had none over the offence as proved. He said that the evidence had proved the criminal matters to have been wholly done and completed in the West Indies, and the Court of King's Bench could not take cognizance of the East India Bill, which had been passed expressly for the purpose of giving the Court of King's Bench jurisdiction of Eastern delinquency. Lord Kenyon assented to the objection respecting the jurisdiction of the Court, where the criminal matter arose wholly abroad, and agreed that in such case, to warrant the interposition of the Court of King's Bench, an act of parliament was expressly necessary.

An excess of jurisdiction may be redressed.

To give a Court jurisdiction over offences arising a broad, it must be sanctioned by the statute creating the liability.

Judicial Notice. See *tit. Action; Evidence*.

Jurat. See *tit. Affidavit*.

Jury.*

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* There are few portions of our judicial system which have experienced greater change or been made susceptible of more important modifications, than the law concerning trial by jury. On its first institution the jurors performed several distinct duties, and exercised separate functions. They were at once witnesses, investigators, and judges. No one was anciently competent to be a juror unless he really knew, or was supposed to be acquainted with, the facts of the cases upon which he was afterwards judicially to pronounce his opinion. Hence it was that a jury was summoned for each separate hundred. And also that they were subject to attain for a false or erroneous verdict.

Trial by jury seems to have been first recognized by the legislature in an act passed in the reign of Henry the Second. In cap. 29. of Magna Charta it is especially declared, that no freeman shall be injured in his person or his property, except by the legal judgment of his peers or the law of the land. Some discussion has been raised, whether this clause refers to trial by jury. Lord Coke and Mr. Justice Blackstone so interpret it; but Mr. Reeves in his History of the English Law. vol. 1. p. 29. says that the word *pariam* in the statute merely applies to the earls and barons, and has no relation whatsoever to trial by jury. This position of the learned historian has since been successfully combated by Mr. Cary, who refers to the 25 Edw. 3. stat. 5. c. 4, in confirmation of the construction put upon the words by Coke and Blackstone. The first provision allowing juries to give their verdict at large, and respecting the summoning of jurors, is in 13 Edw. 1. stat. 1. c. 33. s. 2. It is ordained, that the justices assigned to take the assizes shall compel the jurors to say precisely whether it be disseisin or not, so that they do show the truth of the deed, and require aid of the justices. But if they, of their own head, will say that it is disseisin, their verdict shall be admitted at their own peril. and from hence forth the justices shall not put in assizes or juries any other than those that were summoned to the same at first.

We now come to a period of our history in which such great improvements were made both in the theory and practice of our laws, that from this time, the reign of Edward the

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p. 726.II. _____ EXEMPT FROM BEING A JU-
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ANCE OF JURORS.(A) OF THE NATURE OF AND DIFFERENT KINDS OF, and see *post*, tit.
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I. RELATIVE TO WHO IS COMPETENT TO BE A JUROR.*

II. RELATIVE TO WHO IS EXEMPT FROM BEING A JUROR.†

Third, the statutes have obtained the name of *nova statuta*, as distinguished from those passed in the former times, which consequently are called *vetera statuta*. The statutes relating to jurors and trial by jury have become so many and so various, that to attempt to give an intelligible view of them would require more space than the nature of the present work will allow.

The law stated in the text is consistent with the provisions introduced by the 6 Geo. 4. c. 50. which repeals all the prior acts, and consolidates the whole law upon the subject into one compendious legislative declaration.

The primary objects of the New Jury act were: 1st. To consolidate, simplify and amend the existing law, relative to the qualification, summoning, and formation of juries. 2ndly. To increase the number of persons qualified to serve on juries; for, as the population and wealth of the country augment, civil and criminal suits necessarily multiply; it became desirable, therefore to lighten the duties of those who are liable to be called from their private pursuits to aid the administration of justice. 3rdly, and lastly. To remove the complaints which had long been urged on the partial and defective mode of striking special juries.

* Every man between the ages of twenty-one and sixty years, residing in any county in England, who has in that county, either in his own name, or in trust for him, ten pounds per annum above reprises; that is to say, of clear yearly income, arising out of lands or tenements, whether freehold, copyhold, or customary tenure, or of ancient demesne; or of rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together, in fee-simple, fee-tail, or for his own or other person's life; or who has in the same county twenty pounds per annum above reprises in lands or tenements held by lease or leases for the absolute term of twenty years or more, or for any term of years determinable on any life or lives; or any householder who shall be rated or assessed to the poor-rate, or to the inhabited house duty in the county of Middlesex, on a value of not more than thirty pounds, or in any other county of not less than twenty pounds, or who shall occupy a house containing not less than fifteen windows; see 5 Geo. 4. c. 50. s. 1.

† Poore (6 Geo. 4. c. 50. s. 6.), judges of the King's Court of Record at Westminster, and of the courts of great sessions in Wales, clergymen in holy orders, priests of the Roman Catholic faith, persons who shall teach or preach in any congregation of Protestant dissenters, sergeants and barristers at law, attorney, solicitors and proctors; officers of any such courts actually exercising the duties of their respective offices; coroners, gaolers

REX v. PUGH E.T. 1779. K. B. Doug. 188.

This was a case reserved upon an indictment on the statute of 3 & 4 Anne, c. 185. against the defendant, as high constable of the hundred of Battle, in county of Sussex, for not obeying a warrant of the justice in quarter sessions, by which he was commanded to issue his precepts to the petty constables, headboroughs, and tything-men of and belonging to the respective boroughs of the said hundred of Battle, for the purpose of preparing lists of persons qualified to serve on juries, &c., and for not returning such lists to the said justices at the Michaelmas sessions following. The indictment had been removed by *certiorari* from the quarter sessions, and was tried at the last assizes for Sussex. The case set forth, that the defendant had been legally appointed to his office; that a warrant (stated in *hæc verba*) issued at the Midsummer sessions; that he was duly served with it, and neglected and failed to issue forth his precepts &c. That William I., when he founded the Abbey, granted among other things, "*quod habeat curiam suam per omnia et regiam libertatem et consuetudinem tractandi de suis rebus vel negotiis, et justitiam per se tenendam*," sanctuary for felons, freedom from all episcopal jurisdictions &c. That Henry I., by two several charters, part of which were set forth, confirmed the privileges granted by William I. That Henry VIII. granted the manor and hundred of Battle Abbey to Sir Anthony Brown, his heirs and assigns, with, power to hold such views of frank-pledge, court-leet, hundred courts, law days, sokes, returns of writs, cognizances of pleas, and other rights, jurisdictions, powers, liberties, &c. as late abbot, or any of his predecessors, had held and enjoyed in right of the said abbey. That under this grant, the manor and hundred had come by various mesne assignments to the present proprietor, Sir Whistler Webster, bart.; that the defendant levied within the manor; that the manor and hundred are co-extensive; and that there had been a court of record regularly held within the manor till the year 1744; that by immemorial custom, the residents within the hundred had not been returned to serve on juries out of the hundred; and that no precepts had ever been issued from time immemorial by the High constable of Battle; that no proof was given of any allowance of this privilege; that the town of Battle is not a town corporate that has power by charter to hold sessions of gaol delivery or session of the peace for such town. The defendant was found guilty, subject to the opinion of the Court on the following question: viz, "whether the above charters and immemorial custom would exempt the inhabitants of the hundred of Battle from serving on juries, and the high constable from issuing his precepts, or whether the several acts of parliament passed and now in force, concerning jurors, or some or one of them have not taken away such exemption? The Court held that the statute did not take away the prior exemptions.

III. RELATIVE TO THE JURY LIST.*

and keepers of houses of correction; members and licentiates of the Royal College of Physicians in London; surgeons being members of one of the Royal Colleges of Surgeons; apothecaries, officers of his Majesty's navy or army on full pay; pilots; the household servants of his Majesty; officers of customs and excise, sheriffs' officers, high constables, and parish clerks. It is farther provided, by 6 Geo. 4. c. 50. s. 2. that all persons exempt from serving on juries in any of the courts before mentioned, by virtue of any prescription, charter, grant, or writ, shall continue to enjoy such exemption as heretofore. No justice of the peace shall be summoned or impanelled to serve at any sessions of the peace for the jurisdiction of which he is justice, see 6. Geo. 4. c. 50. s. 48. Inhabitants of the city and liberty of Westminster are exempted from serving on any jury at the sessions of the peace for the county of Middlesex; see 6 Geo. 4. c. 50. s. 48. No person shall be impanelled or returned to serve on any jury for the trial of any capital offence in any county, city, or place, who shall not be qualified to serve as a juror in civil causes within the same county, city or place.

* The clerk of the peace, each in his proper district, in the first week in July in every year must issue and deliver his warrant in proper form to the high constable of each separate hundred or district, commanding them to issue forth their precepts to the churchwardens and overseers of the poor of the several parishes and townships within their constable-

[728] IV. RELATIVE TO THE PROCESS TO SECURE ATTENDANCE OF JURORS.

(A) OF THE NATURE OF AND DIFFERENT KINDS OF.*

1. *REX V. WORRINGTON*. T. T. 1690. K. B. Show. 329. *REX V. NORTH*. H. T. 1693. K. B. 1 Salk. 143.

If there are two sheriffs of a county, and one of them is partial, the *venire* must be directed to the other, and not to the coroner.

Information for a riot committed in Chester. It was suggested upon the roll that one of the sheriffs was a defendant upon which the *venire facias* was prayed and directed to the other sheriff. Upon not guilty pleaded, the jury found them guilty. After which it was moved in arrest of judgment, that the *venire* should have been awarded to the coroners, because both sheriffs make but one officer; or rather that both persons make but one sheriff. *Sed non allocatur*; for though one be challenged, the other may execute the writ; but he does it in the name of both; as where one arrests a man, or neglects to arrest a man, the arrest or neglect is the act or neglect of both. The coroners are not the proper officers of the court in any other case, but where the sheriff is absolutely improper; not where there is no sheriff at all. If the sheriff die, the coroner cannot execute, &c. In the case of the two coroners, if one be challenged the other must act; yet both make but one officer; so in this case, one sheriff is challenged, *ergo*, the other must act; 2 Mod. 24.

Blewicks, which precepts require them to make out a list before the 1st of September next ensuing, of all persons within their respective parishes or townships liable to serve on juries; For filling up the returns, the churchwardens and overseers of the poor are to make out a true list, in alphabetical order, of all men qualified to serve as jurors, with the christian and surnames at full length, and with their place of abode, the title, quality, calling or business, and the nature of the qualification of every such person. The list of qualified persons, resident in each ward of the city of London, must be made out with the proper quality or addition, and the place of abode of each man, by the parties hitherto accustomed to make out such lists; the shop, warehouse, counting house, chambers or office of each person so qualified, to be deemed the place of abode for the purposes of the act. Abbott. C. J., decided, provided a man's family is domiciled in the city, though he is not in trade, but holds a public office, nor a householder, occupying only a part of a house, he is qualified to serve on a special jury in London.—K. B. Gaildhall, Jan. 9. 1827. The churchwardens and overseers must have completed the list before the first Sunday in September; and on the first three Sundays in that month must fix a true copy of each list on the principal door of every church or place of public worship in their respective parishes or townships; they must subjoin to such list a notice, stating when and where all objections to the same will be heard by the justices of the peace; they are likewise to keep a copy of such list to be read without fee by any inhabitant of their parish or township, at any reasonable time during the first three weeks in September, in order that notice may be given of men qualified who are omitted, or of men inserted who are not qualified; such to be provided at the expense of each parish or township; see 6 Geo. 4. c. 56. s. 2.

* The process requiring the attendance of the jury is never used out until the issue between the parties is complete (see *ante*, tit. Issue); as soon as these parts of the proceedings are perfected, the Court is supposed to award a writ of *venire facias* upon the roll or record addressed to the sheriff commanding him to cause to come to Westminster, (or, if the proceedings in the same have been commenced by original, "wheresoever we shall then be in England"), on a specified day twelve good and lawful men, qualified according to law, by whom the truth of the matter in issue between the parties may be better known. In preparing this writ there ought to be fifteen days between the rule and return. But by the statute 18 Eliz. c. 14. it shall be aided after verdict, if the return be insufficient or imperfect; and by statute 21 Jac. c. 18. if there be no return when the panel of the names of jurors is annexed to the writ, or if the name of the sheriff is not put to the return when the writ is returned to the proper officer; see Com. Dig. 174. This writ, though in many cases issued, is at present of no practical use; the jury, though summoned to attend here, that is to say, at the King's Court at Westminster, never make their appearance; but a second writ is taken out, called in the King's Bench a *distingas*, and in the Common Pleas, *Nobis corpus juratores*, commanding the sheriff to distrain them by their lands and goods or to have their bodies, that they may appear on the day appointed; that is to say, the jurors commanded in the *venire*, and who have made default are excused from appearing until some named day at Nisi Prius, "unless before that day the justices assigned to hold the assizes in your county shall have come to the place appointed for holding the assizes." Hence it derives its name of Nisi Prius; but it is well known that the justices will come to the place appointed for holding the assizes before the day mentioned in the writ, and therefore the jury have to attend at such assizes, and there try the cause. These writs are directed to the sheriff, or if he be a party to the suit, or in any way connected with the litigants, it should be addressed to the coroners, or if they are not indiffer-

2. HOLLAND V. HERON. T. T. 1749: C. P. Barnes, 465.

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The sheriffs and coroners of London being interested in the question to be tried, it was for plaintiff moved, that defendant might show cause why a special jury should not be struck and returned by elisors to be appointed by the Court. *Per Cur.* The special jury may be moved for of course, after elisors appointed. Rule was to show cause why it should not be referred to the prothonotary to consider of two fit persons to be elisors, and to report.

Elisors are appointed by motion to the Court.

(B) TEST OF, RETURN OF,* AND PANELS TO.†

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1. WALDO V. HARRISON. E. T. 1773. C. P. Barnes, 5.

It was moved to amend the writ of *habeas corpora jurator* after trial, returnable on Wednesday next, after eight days of the Purification, instead of Wednesday in fifteen days of Easter. Court made a rule to show cause, which was afterwards made absolute.

The return of *habeas corpora* may be amended after trial.

and, then the venire must be directed to two elisors appointed by the court, or, by the consent of the parties, process may be directed to two justices of the peace. Where proceedings are directed to a coroner or elisors, all subsequent process must be addressed to them, although a new sheriff be appointed; 2 Saund. 101, 102; 8 Com. Dig. 172; Dy. 367. In a county palatine the record is sent by *mittimus* to the justices there, commanding them to issue the process; and when the case is tried, to send the record back again to the court above.

In addition to the method of returning and summoning jurors already described, judges in the Court of Kings Bench, and all courts of oyer and terminer, gaol delivery, the superior courts of the three counties palatine, and courts of sessions of the peace in England, and all courts of great sessions and sessions of the peace in Wales, have been used to issue a writ, precept, or bare award or order for the return of a jury for the trial of criminal matters in their respective courts, independent of the writs of *venire* and *distingas*, already explained. This power was given them by 3 Hen. 8. c. 12. and is continued by the act lately passed, see s. 20; but with this alteration, that the jury must now be summoned generally from the county, and not from any particular hundred or hundreds, and must be qualified according to the present act.

In the King's Bench the venire must be tested on the first day of the term in or after which the cause is to be tried, and is made returnable on some day before the trial being a general return day or days certain, according to the previous proceedings. In a country cause, the venire by original is made returnable on the last general return-day, or by bill on the last day of the term before assizes; see Tidd. 795. In the Common Pleas the venire must be tested, if in term, the first return of the term in which the cause is to be tried, if in London, and returnable some day before trial; if after term, it may be tested the first day of term, and returnable the last general return day; in a country cause it must be tested the first return-day of the term preceding the assizes, and returnable the last day of that term; see Boote, 286. n. 1. The *distingas* or *habeas corpora* is tested on the *quarto die post* of the return by original, or by bill on the return of the venire, and made returnable on the first general return day or days certain, in term time, after the trial. It is not necessary by original that there should be fifteen days between the test and return of the jury process. The venire and *distingas* or *habeas corpora* are sued out together, and after being sealed (for they do not require signing in the King's Bench), are taken to the sheriff's office to be returned. In causes which stand over from one sitting to another, the writ of *distingas* or *habeas corpora* should be regularly altered and resealed; previous to the sitting to which they stand over; or in default thereof the causes cannot be tried; see Tidd. 795. The want of good test cannot be amended; see 3 Com. Dig. 174. A *distingas* is awarded by the court at the return of the venire, and ought to be tested the same day, otherwise it is without warrant and makes a discontinuance; see 3 Com. Dig. 174. But the want of a return is cured by the appearance of and trial by a proper jury; 3 Com. Dig. 5322; and the return of a venire may be amended.

† The sheriff, on his return of the venire for the trial of all issues before any court of assizes or Nisi Prius, in any county in England except the counties palatine, unless in causes intended to be tried at bar, or in cases where a special jury is struck by order or rule of the court, must annex a panel to the writ, containing the names of a competent (see 6 Geo. 4. c. 50. s. 15.) number of persons taken from the jurors' book of the current year, arranged alphabetically, with their respective places of abode and their additions; the number of jurors so returned by the sheriff for the trial of issues at the same assizes or sessions of Nisi Prius in each county, must not be less than forty eight nor more than seventy-two, unless by direction of any one of the judges, who are empowered by order under their hands, to direct a greater or lesser number to be returned; see Geo. 4. c. 50. s. 15. If the name of a juror was mistaken in the return, the sheriff might come into court and amend it. A misprision in the surname, when they were of the same sound is not material; nor a misprision in the surname, where it was the same person, as where in the *distingas* for Baskerville it was amended without examination of the sheriff, by stat. 8 Hen. 8.

The Court will *ex officio*, and against the will of the defendant [731] amend the Christian name of a juror who acknowledges he was the person summoned.*

To describe a juryman as of a place generally is sufficient, though there are several places of the same name.

When a person not summoned on the jury was sworn on a jury in [732] the name of another, the Court awarded a *venire de novo*.† But where the son of a juryman summoned and returned, having answered to his father's name,

2. KING v. ROBERTS. M. T. 1744. K. B. 2 Stra. 1214.

On a trial at bar of a traverse to an inquisition of lunacy, one of the jury was called by the name of Henry, and informed the Court that he was christened by the name of Harry, but owned that he was the person summoned: it was proposed to alter it by counsel; but the defendant's counsel refusing, the Court ordered it to be amended *ex officio*, by virtue of the statutes of 8 Hen. 6. c. 12. and c. 15; and so the trial went on.

3. REX v. STONE. H. T. 1796. K. B. 6 T. R. 527.

None were sworn on the jury who had not a freehold in the county, or who were above seventy-eight years old. The prisoner's counsel objected to one of them, as being ill-described, his place of abode being stated to be Grafton-street; and it was said that, as there were several of that name, there should have been something added to distinguish which Grafton-street was meant. This objection was overruled, whereupon the prisoner challenged the jurymen peremptorily.

(C) OF THE ATTENDANCE OF THE JURORS.†

1. DOVEY v. HOBSON. H. T. 1816. C. P. 6 Taunt. 460.

A person, not summoned on the jury, was sworn on a jury at Nisi Prius, in the name of a person for whom a summons to serve on that jury was delivered, and to whose house he had succeeded; the irregularity being noticed before verdict, the Court awarded a *venire de novo*.

2. HILL v. YATES. E. T. 1810. K. B. 12 East, 229.

It was moved to set aside the verdict and to have a new trial, on the ground of a mistrial, because the son of one of the jurymen returned upon the panel had answered to his father's name when called, and served upon the jury, which fact was now verified by the affidavits of the son and of the defendant's attorney, and also of the sheriff's officer who summoned the jury, and who swore to have summoned the father and not the son. The case of Norman v. Beaumont was referred to, of which a very full report is given in Willes's Rep. as a misprision of the clerk, for the *venire* is the warrant of the *distringas*, see 1 Com. Dig. 321. 323; nor is it material, where there is an abbreviation in the Christian name, as Francis for Franciscus, in the *venire*.

But where the panel of the jury who were to try an indictment against Willis, was by mistake annexed to a *distringas* upon an indictment for the same offence against Brown, the verdict was holden bad, because they were found by jurors who had no authority to try the indictment; King v. Willis, 1 Barnes; 108.

† When the sheriff has made up the panel, he must summon the jurors whose names are contained therein, at least ten days before the day of their appearance, by showing to the man to be summoned, or in case he is absent from his usual place of abode, by leaving with some person living there, a note in writing under the hand of the sheriff or other proper officer, containing the substance of such summons. The period of summons before appearance was formerly eight days, except in the city of London or county of Middlesex, in which two districts the period required was only six days. The above-mentioned provisions do not extend to London (6 Geo. 4. c. 50. s. 25) or Middlesex; but the period is still six days. It is further enacted, that where the period between the award of any writ of *venire facias*, *habeas corpora*, or *distringas*, and the return of such writ is less than ten days, then every juror may be summoned, attached, or distrained to appear at the day and time in such writ mentioned; see 6 Geo. 4. c. 50. s. 25. In case any juror having been summoned according to law, on any kind of jury, in any of the courts in England or Wales, does not attend, or being thrice called does not answer to his name, the Court may set such fine on the person so making default as it may think proper, unless some reasonable excuse is proved on oath or affidavit; 6 Geo. 4. c. 50. s. 38. The same power is extended to every court of Nisi Prius,oyer and terminer, gaol delivery, and sessions of the peace held for the city of London, (see 6 Geo. 4. c. 50. s. 51.) to fine any person making default when summoned to attend upon any kind of jury in any such courts.

‡ A person not duly summoned and returned need not serve on juries. If a stranger cause himself to be sworn in the name of one who was empanelled and returned, it is in such case a misdemeanour, for which he may be indicted, and for which an action on the case lies at the suit of the party injured; see Marsh 81. A fine for not attending as a special juror, at the C. P. at Westminster, having been imposed upon a gentleman having a house in London and in Brighton, but who had resided the twelve months preceding at Brighton, the Court refused to remit it, 1 Y. & J. 399; but where the party summoned had let his house and was abroad, which fact was communicated to the summoning officer the court remitted the fine; 1 Y. & J. 401. So, where it had been left at a wrong house; *Id.*

484. and which is also reported in Barnes, 453. where, upon great deliberation, a verdict was set aside for the same cause. The Court, however, considering the extreme mischief which might result to the public from setting aside a verdict upon a motion for a new trial on such a ground, inasmuch as the same objection might happen to lie against every verdict on the civil and criminal sides at the assizes; and recollecting that the same objection had been taken and overruled since the case of Willes, though the name of the case did not then occur, refused to entertain the motion, but said, that if upon consideration and consultation with the other judges, they found themselves bound to grant it, they would of their own accord award the rule prayed for.

V. RELATIVE TO A SPECIAL JURY.*

1: REG GEN. H. T. 1808. K. B. 10 East, 1.

It is ordered by the Right Honourable Lord Ellenborough, C. J. that in future no cause shall be tried by a special jury in Middlesex or London, unless the rule for a special jury be served, and the cause marked in the marshal's book as a special jury, on or before the day preceding the adjournment day in Middlesex and London respectively. See 4 D. & R. 836.

* Special juries were originally introduced in trials at law, when the causes were of too great nicety for the adjudication of ordinary freeholders; or where the sheriff was suspected of partiality, though not on such valid ground as to warrant an exception to him. Either party is entitled, upon motion in court, to have a special jury in the trial of any cause, whether civil or criminal, or on any penal statute, excepting only indictments for treason and felony, the party demanding the special jury paying the extra fees and expense, unless the judge certifies on the record that the cause required such special jury. By the New Jury Act, every man described in the juror's book as an esquire, or person of higher degree, or as a banker or merchant, is qualified to serve on special juries; and the sheriff is bound to enter all such persons, in alphabetical order in a separate list, to be subjoined to the jurors' book, to be called, "The Special Jurors' List;" and shall prefix to every name its proper number in regular arithmetical series, which numbers, marked on tickets, shall be put in a box. The 32nd section directs "That whenever any of the courts or judges above-mentioned shall order a special jury to be struck, the proper officer shall appoint a time and place for the nomination of such special jury, a copy of the rule of court, and of such officers' appointment, shall be served on the under sheriff, in the county of England or Wales in which the trial is to be had, or on the secondary of the city of London, if the trial is to be had there, and also on all parties who have usually been served with the same respectively in the accustomed manner; and the said officer, at the time and place appointed, being attended by such under-sheriff or secondary, or his agent, who are hereby respectively required to bring with them the jurors' book, and such special jurors' list, and all the numbers so written on distinct pieces of parchment or card as aforesaid, shall, in the presence of all the parties in any of the cases aforesaid, and of their attorneys (if they respectively choose to attend, or if the said parties or their attorneys, all or any of them, do not attend them in their absence), put all the said numbers into a box, to be by him provided for that purpose; and after having shaken them together, shall draw out of the said box forty-eight of the said numbers one after another, and shall, as each number is drawn, refer to the corresponding number in the special jurors' list, and read aloud the name designated by such number; and if at the time of so reading such name, either party or his attorney shall object that the man whose name shall have been so referred to is in any manner incapacitated from serving on the said jury, and shall also then and there prove the same to the satisfaction of the said officer, such name shall be set aside; and the said officer shall instead thereof draw out of the said box another number, and shall in like manner refer to the corresponding number in the said list, and read aloud the name designated thereby, which name may be in like manner set aside; and other numbers and names in such cases be resorted to; according to the mode of proceeding hereinbefore described, for the purpose of supplying names in the places of those set aside until the whole number of forty-eight names, not liable to be set aside shall be completed; and if in any case it shall so happen that the whole number of forty-eight names cannot be obtained from the special jurors' list, in such case the said officer shall fairly and indifferently take, according to the mode of nomination and heretofore pursued in nominating special juries, such a number of names from the general jurors' book, in addition to those taken from the special jurors' list, as shall be required to make up the full number of forty-eight names, all and every of which forty eight names shall in such case be equally deemed and taken to be those of special jurors; and the said officers shall afterwards make out for each party a list for forty-eight names, together with their respective places of abode, and additions; and after having made out such list, shall return all the numbers so drawn out, together with all the numbers remaining undrawn to such under-sheriff, or secondary, or his agent; to be by such under-sheriff or secondary safely and securely kept for future use; and all the subsequent proceedings for reducing the said list, and

No cause is to be tried by a special jury, unless the rule be served, and the cause marked as such in the marshal's book [733]

on or before the day preceding the adjournment day in Middlesex or London.

Or in the C. P. two days previous to the adjournment day.

[734]

The rule for a special jury need not be entered on the record. A rule for a special jury may be served sufficiently early to enable the opposite party to strike the jury before the day of trial.

Where an ejectment by original was appointed for trial at the sittings in term, and the defendant obtained a rule for a special jury, the Court held that he might obtain.

2. REG. GEN. T. T. 1812. C. P. 4 Taunt. 600.

It is ordered that in future no cause shall be tried by a special jury in this court, in Middlesex or London, unless the rule for such special jury shall be served, and the cause marked in the marshal's book as a special jury cause two days previous to the adjournment day in Middlesex or London respectively.

3. REX v. PEFFY. M. T. 1793. K. B. 5 T. R. 454.

Per Cur. The rule for a special jury need not be entered on the record.

4. GUNN v. HONEYMAN. H. T. 1819. K. B. 2 B. & A. 400.

The rule for a special jury, with an appointment to nominate, was served on the plaintiff's attorney about six in the evening on the 5th of February, and on the 6th the plaintiff tried the cause by a common jury. It was now shown for cause, and contended, that in order to make the rule for a special jury a *supersedeas* to the common jury, it ought to have been obtained and served sufficiently early to enable the party to strike the jury before the time appointed for the trial of the cause.

Per Cur. Common sense pronounces the rule to be, that the cause is to be tried by a common jury, unless it be put in a condition to be tried by a special jury; and that is not done, unless the rule be served sufficiently early to enable the other party to strike the special jury; we are of opinion, therefore, that this rule should be discharged.

5. DOE, D. LORIMER, v. LORIMER. H. T. 1819. K. B. 1 Chit. Rep. 236.

This was an ejectment by original, and notice of trial was given for the third sitting in this term. A rule for a special jury was obtained on the part of the defendant on the 8th instant, and a cause was appointed for a trial on the 9th. On a former day a rule was obtained calling on the defendants to show cause why the rule for a special jury should not be discharged upon an affidavit stating these facts, alleging that there was not any possible defence to this action. It was now urged that the plaintiff could gain nothing by this motion, because the proceedings being by original, he could not get judgment by the present term; and, therefore, the only ground upon which the motion could be sustained, viz. that of an unjustifiable delay, completely failed.

Abbot, C. J. I should have thought so too, if the case could have been tried with effect in this term. If the plaintiff had proceeded to trial on the 9th, and obtained a verdict, the proceedings would not have been set aside; but as he did not think fit to do so, we cannot now interfere.

do so, as the plaintiff could not have obtained judgment of the term in which the rule was

6. CRADOCK v. DAVIS. H. T. 1819. K. B. 1 Chit. Rep. 176.

A rule for a special jury will not be discharged where there is sufficient reason to believe that it is material.

A rule, calling on the plaintiff to show cause why the rule for a special jury in this case should not be discharged on an affidavit, stating that the action was brought for goods sold and delivered after indulgence given, for which a bill of exchange had been taken, and, therefore, it was contended that this was not a case which need be tried by a special jury. The Court said there might be

other matters whatsoever relating to special juries, shall remain and continue in force as heretofore, except where the same or any part thereof is expressly altered by this act; and all the fees heretofore payable on the striking of special juries, shall continue to be paid in the accustomed manner, see 6 Geo. 4. c. 50. s. 32; provided always and be it further enacted, that where any special jury shall be ordered by any rule in any of the courts aforesaid to be struck by proper officers of such court, in any cause arising in any county of a city or town, except the city of London, the sheriff or sheriffs thereof; or the under-sheriff respectively, shall be commanded by such rule to bring or cause to be brought before the proper officer of such court, the books or lists of persons qualified to serve on juries within the same county of a city or town; and in every such case, the jury shall be taken and struck out of such books or lists respectively in the manner heretofore used and accustomed; any thing in this act to the contrary notwithstanding; see 6 Geo. 4. c. 50. s. 36. When either of the parties in an action wishes to have a special jury struck, he gives a brief to counsel for that purpose, which is then carried to the clerk of the rules, who draws up the rule; when the rule is drawn up, an appointment is had of the master's in the King's Bench, or the prothonotary's in the Common Pleas, and a copy of the rule and appointment served on the attorney of the opposite party. The cases connected with striking a special jury under the old method are 1 Salk. 405; Key v. Wooller, 1 B. & A. 193. The ancient plan may still be resorted to by consent of the parties, see s. 33.

circumstances subsequent to the drawing of the bill, material to the defendant in the present action; and from what had been stated there seemed to be no reasonable ground for depriving the defendant of the advantage which he sought in having his case tried by a special jury.—Rule discharged.

7. *FARREN v. RICHARDS*. T. T. 1818. N. P. 2 Stark. 369. S. P. *SNOOK v. SOUTHWOOD*. H. T. 1824. N. P. 1 R. & M. 429. [735]

This was an action by the plaintiffs, as the indorsees, against the defendants as the acceptors of a bill of exchange, for the sum of 546*l.* 12*s.* 6*d.* When the cause was called on in its regular order, as a common jury cause, it was stated by the defendants that a special jury had been moved for, but that no steps had been taken to reduce the jury, because, according to the common course, the cause would not be tried by a special jury before the sittings after Trinity term. Lord Ellenborough said, that since no special jury had been struck, it was competent to the plaintiff to try the cause at his peril. In the ensuing term, a motion was made to set aside the verdict. The court said, that it was incumbent upon a party who meant to have his cause tried by a special jury, to pursue the object in all its steps, and to do every thing in his power in order to enable the other party to apply to the judge at Nisi Prius to try the cause, upon a statement that it would occupy no more time than a common cause; but since the defendants produced an affidavit of merits, and suggested that, if a new trial were not granted, the plaintiffs would retain a verdict for a sum far exceeding their just demand, the Court granted the rule, on the defendants' undertaking to pay the money into court.

8. *BLOXAM v. BROWN*. T. T. 1812. C. P. 4 Taunt. 470.

Rule nisi, for setting aside a rule which the defendant had obtained for a special jury, upon a suggestion that the special jury was moved for only for the purpose of delay. The cause, which was an action upon a bill of exchange, stood in due course to be tried within the term, if not prevented by the special jury. Mansfield, C. J. declared, that if a special jury could be struck, he would try the cause within the term. He added, that these motions to discharge rules for special juries had been very rare, until of late, and only one or two had now occurred, since the abuse of special juries had been so prevalent.

9. *MALTEY v. MOSES*. T. T. 1819. K. B. 1 Chit. Rep. 490. *SERMON v.*

BUCKNELL. T. T. 1819. K. B. 1 Id. 539.

Cause was shown against a rule obtained to discharge a rule for a special jury; it was admitted there had been acknowledgments of the debt, but contended they had been given under a delusion produced by the plaintiff. It was an action brought in consideration of getting the defendant appointed joint lecturer of an hospital. Bayley, J. said, that this was not one of the cases in which the Court would make this rule absolute; but intimated that the defendant must consent to give the plaintiff judgment of this term, if he should obtain a verdict in his favour. On the next day, however, the learned judge said, that he ought not to have imposed these terms; that it was never done except when the application is made for delay, and every thing in this case seemed to indicate and show a contrary intention.—Rule discharged.

10. *BREGGS v. DIXON*. E. T. 1820, C. P. 6 Moore, 414. *MALTEY v. MOSES*. T. T. 1809. K. B. 1 Chit. Rep. 490. [736]

The Court will not discharge a rule obtained by a defendant for a special jury, where no delay appears; nor will it be presumed to have been obtained for delay, although the defendant acknowledged the debt; and it was sworn that it was believed he had no defence to the action.

11. *TRIFF v. PATMORE*. T. T. 1820. C. P. 4 Moore, 470.

It was moved that this cause might be tried within the term, on the ground that the defendant had obtained a rule for special jury merely for delay. The action was brought on a common money bond, and the defendant had pleaded *non est factum, ad solvit post diem*, the latter of which pleas had been afterwards withdrawn. The counsel read an affidavit, which stated, that the defendant had admitted the money to be from him to the plaintiff on the bond, special jury

the Court could not direct the cause to be tried with jury or not.

and the case of *Bloxam v. Brewer*, 4 Taunt. 470. was relied on; but the Court held that it was necessary for the plaintiff to state further grounds from which they might judge whether this were a fit cause to be tried by a special

jury or not.

12. *REX v. PERRY*. M. T. 1793. K. B. 5 T. R. 453. *SAME v. FRANKLIN*.

M. T. 1793. K. B. Id. 454.
Information was filed by the Attorney-General against the defendants for a libel, to which they pleaded not guilty, in Trinity term. In the same term a special jury was struck, but for the default of jurors at the sittings after Trinity term, the information was not tried. A rule having been since obtained for striking a new special jury, under the stat. 3 Geo. 2. c. 25. s. 15. the Court made the rule absolute.

13. *MAYOR OF DONCASTER v. COE*. H. T. 1811. 3 Taunt. 404.

Action of trespass had been brought by the corporation of Doncaster against this and another defendant, to assert the exclusive property of the corporation to certain river banks and other lands, which the defendants contended to be either of public right or subject to ensement, enjoyed by themselves individually. In both cases, special juries were struck, consisting of the same persons; and one of the causes having been tried; the Court directed that the verdict should be set aside, and that the cause should abide the event of the trial of this cause, upon the ground that the jury had found a verdict contrary to the weight of the evidence. Heath, J. It is a sufficient ground for this motion, that the same jurymen have tried a similar cause. The former part of this rule, so far as relates to discharging the special jury, must be made absolute; the latter part need not be granted.

Court being dissatisfied with the verdict in the first trial, direct that it shall abide the event of the second, they will also discharge the same jury from trying the second.

[737] 14. *HOLT v. MEADOWCROFT*. H. T. 1816. K. B. 4 M. & S. 467.

The plaintiff obtained a rule for a special jury, which was regularly struck, but a common jury panel was returned, together with the special jury panel; and at the trial at the last assizes, none of the special jury attending, it was proposed on the part of the plaintiff, to try the cause by a common jury; to which the defendant's counsel objected that this could not regularly be done; but the judge finding a common jury panel annexed, was of opinion that he ought to try the cause, and the cause was tried, and there was a verdict for the plaintiff, the defendant's counsel appearing and making defence.

Lord Ellenborough, C. J. What might have been the effect of the defendant's appearing at the trial and making a defence without any protest against trying the issue, it is unnecessary at present to inquire, because we find that the defendant did protest and did all in his power to resist the proceeding. I cannot agree that it amounts to a consent on the part of the defendant, because, being as it were tied to the stake, and dragged on to trial, he endeavours to make the best of it. The language of the statute does, I think, import a negative; and it may be very doubtful whether the witnesses would be indictable for perjury upon a trial such as this. That is a mischief which I think shows that the verdict ought to be set aside. It frequently occurs that none of the special jurymen appear at the trial, in which case the practice is uniform that the cause goes over.

15. *ANON.* M. T. 1700. K. B. 12 Mod. 567.

In an action for words, a rule was made for the sheriff to return a special jury, who, notwithstanding the rule had been served upon him, returned only a common jury. After trial, this Court was moved for a new trial, which was denied, because he had made a defence; for since if the verdict had gone for him, he would have had the advantage of it, it is fit he should submit to it now that it has gone against him. *Secus*, if he had not made a defence.

16. *MASSEY v. JOHNSON*. H. T. 1810. K. B. 12 East, 69.

The counsel stated by way of objection that the cause had gone down to a trial at Chester by *millimus* without an order for a special jury, and after it was

After a special jury has been once struck the jury alone, or as many of them as appear, with the addition of aldermen can try the cause.

Where the same special jury men are struck to try several causes depending up on the same question, and the

Court being

dissatisfied with the verdict in the first trial, direct that it shall abide the event of the second, they will also discharge the same jury from trying the second.

When a rule is obtained for a special jury the sheriff has no authority to return the common jury panel, and the defendant, after taking the objection in limine, is not precluded from moving for a new trial by defending the cause;

entered, application was made to the Court there by the defendant for a special jury, which the plaintiff opposed; but the Court at Chester granted it, saying, that it was their practice so to do. Le Blanc, J., asked how advantage could be taken of this, upon the motion to set aside the nonsuit then before the Court? and Lord Ellenborough, C. J., afterwards said, that the objection, if any, was cured by the plaintiff's appearance.

17. *LOOKYER v. EAST INDIA COMPANY*. M. T. 1761. K. B. 2 Wils. 136. [738]

An action of covenant upon a charter party was tried at the bar by a special jury of the citizens of London, who all consented to be sworn, and waived any privilege as citizens of London in not being obliged to go out of the city to serve on juries.

don was allowed in Middlesex upon their own consent to waive the privilege.

18. *SYMONDS v. FARMINTER*. M. T. 1748. N. P. Bull. N. P. 304.

Per Cur. From the penning of the act, it appears to extend only to the trial of any issue joined; therefore, the Court will not grant a special jury upon a writ of inquiry.

19. *CURTAIN v. DURHAM*. T. T. 1817. K. B. 2 Chit. Rep. 134.

This action was for dilapidations. It was moved for a rule nisi for the master to renew his taxation of costs on two grounds; first, that he had not allowed the proper costs of a special jury, but, only the sums which had actually been paid them; and secondly, that sufficient expences were not allowed for the witnesses. The judge had certified.

Lord Ellenborough, C. J., first thought that the act only allowed in such cases the money actually paid to the jurors; but, upon referring to the statute, he and the Court were of opinion that where the judge certifies, the party is entitled to all the costs from which he is by the act excluded if the judge does not certify, and, therefore, here the party is entitled to all the costs of the special jury. Rule nisi.

20. *WAGGETT v. SHAW*. M. T. 1812. N. P. 3 Campb. 316.

This case was tried by a special jury, when the plaintiff recovered a verdict. The counsel for the plaintiff now applied that his lordship would certify under 24 Geo. 2. c. 18. that it was a proper cause to be tried by a special jury.

Lord Ellenborough. The statute provides that the judge before whom the cause is tried, if he sees fit, shall immediately after the trial certify in open court under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury. I do not think I have authority to grant such a certificate the day after the trial; and I have always been in the habit of refusing applications so made.

VI. RELATIVE TO A JURY DE MEDIETATE.†

[739]

VIII. RELATIVE TO THE CALLING AND SWEARING OF.‡

* And if a case be not gone into, the judge will not certify that it was a fit cause to be tried by a special jury, merely because the declaration is for penalties to a very large amount, and because persons of considerable rank are subpoenaed; 1 C. & P. 537.

† An alien indicted or impeached of any felony or misdemeanour, has the right of being tried by a jury de medietate lingue; and it is enacted, "that on the prayer of every alien so indicted or impeached, the sheriff or other proper minister shall, by command of the Court, return for one half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, and that no such alien juror shall be liable to be challenged for want of freehold or any other qualification required by this act; but every such alien may be challenged for any other cause in like manner as if he were qualified by this act;" see 6 Geo. 4. c. 50. s. 47.

‡ The names of the jury are called; and when the jury is thus completed, they are sworn separately, as follows: "You shall well and truly try the issue joined between the parties, and a true verdict give according to the evidence; so help you God." In criminal prosecutions the oath is different: "You shall well and truly try and true deliverance make between our Sovereign Lord the King and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence; so help you God."

Any, the smallest degree of interest is a sufficient ground for challenging a juror.†

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It is not a good challenge to the array that the sheriff has not taken the oath and made the declarations required by

IX. RELATIVE TO CHALLENGING OF.*

1. *Hesketh v. Braddock*. H. T. 1766. K. B. 3 Burr. 1847.

Per Cur. Any degree, even the smallest degree, of interest in the question depending, is decisive objection to a witness, and much more to a juror, or to the officer by whom the jury is returned.

2. *ANON* T. T. 1688. C, P. Vent. 58.

In an action of trespass, *de uscore abducta cum bonis viri*, to his damage of 10,000*l.* Upon not guilty pleaded, and a trial at the bar, the return of the jury was *Octab. Trin.*, and the appearance day was *die Mercurii*, at which the jury appeared. This plea was recited by the counsel in French, and then a challenge was offered to the array, for that it was returned by J. S., as sheriff of Buckinghamshire, who was made sheriff in Michaelmas term, 1687, and had continued in the office for more than three months, and not taken the oaths and subscribed the declaration required by the act of 25 Car. 2. made for preventing of dangers by popish recusants; and so his office by that act was void to all intents and purposes, before he made this return of the jury. But this challenge was disallowed by the Court, for he must be taken here as a

* When the jurors are called either party is at liberty to challenge them, either the whole panel, or any individual of the panel. Challenges are consequently distinguished into two kinds: challenges to the array, and challenges to the poll. Challenges to the array are an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return. Lord Coke (see Co. Lit. 156.) Lord Coke again divides the former into a principal cause of challenge, or to the favour; a principal cause of challenge is grounded on such a manifest presumption of partiality, that if it be found true, it unquestionably sets aside the array or the juror; but a challenge to the favour leaves it to the discretion of the triers; see 3 Bac. Abr. tit. Juries. The same reasons that before the awarding the venire were sufficient to have directed it to the coroners or eschors, will be also sufficient to quash the array, when made by a person or officer, of whose partiality there is any tolerable grounds of suspicion; see 3 Bla. Com. 359. Principal challenges are subdivided by Lord Coke into four kinds:—*Propter honoris respectum*, *propter defectum*, *propter affectum*, *propter delictum*; see Co. Litt. 156. b. *propter honoris respectum*, when a lord in parliament is impanelled on a jury, he may be challenged by either party or challenge himself; see Co. Litt. 15. *Propter defectum*, when the person challenged is an alien, or not qualified according to law; see 6 Geo. 4. c. 50 s. 27. In juries *de medietate lingue*; neither of these objections hold good; see 6 Geo. 4. c. 50. s. 47. *Propter affectum*, for suspicion of bias or partiality; and this may be either a principal challenge or to the favour; it is a principal challenge when there are evident grounds of suspicion, either of express favour or malice; as that a juror is of kin to either party within the ninth degree (see 2 Bla. Com. 363; that he has been arbitrator on either side; that he has an interest in the cause.

† There is no principle in the law more settled than this,—that any degree, even the smallest degree of interest in the question depending, is a decisive objection to a witness and much more to a juror or to the officer by whom the jury is returned. The law has so watchful an eye to the pure and unbiassed administration of justice, that it will never trust the passions of mankind in the decision of any matter of right. If therefore a sheriff, a juror, or a witness, be in any sort interested in the matter to be tried, the law considers him as under an influence which may warp his integrity, or pervert his judgment, and therefore will not trust him. Challenges to the polls are exceptions to particular persons. Lord Coke reduces them to four heads; see ante 739, and Co. Lit. 156. b. Peremptory challenges are allowed only in cases of treason or felony, in *favorem vite*. Blackstone gives the following satisfactory reasons for this apparently capricious kind of challenge: “As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is a prisoner, when put to defend his life should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man, against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. Secondly, because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty (if he pleases) peremptory to set him aside; see 4 Com. 383.” A person arraigned for murder or felony, is not allowed more than twenty peremptory challenges; see 6 Geo. 4. c. 50. s. 29. In cases of high treason, the prisoner is still allowed thirty five peremptory challenges, the number formerly allowed in all cases of felony. Challenges to the favour are where the party have no principal challenge, but object some probable circumstances of suspicion, as acquaintance and the like; challenges to the favour are determined by triers, who are two indifferent persons named by the court, or the two first jurors allowed; if the triers appointed by the Court find one man indifferent, he is sworn, and he and the two triers try the next: and when another is found indifferent, the two triers are superceded, and the two sworn first on the jury try the rest; see 3 Bla. Com. 303.

sheriff *de facto*, and if such a challenge should be allowed, no trial could be had, but should be off, unless the party were ready to show that the sheriff had taken that test.

3. *REX V. EDMONDS*. E. T. 1821. K. B. 4 B. & A. 471.

Rule nisi for a new trial, on the three following grounds: 1st. That the Lord Chief Baron had refused to allow the master a challenge to the array, on the ground of alleged unindifferency of the Crown-office in nominating the special jury, and to appoint triers to try the facts alleged in support of that charge. 2nd. That he refused similarly to allow a challenge to the array, on the ground of the alleged unindifferency of the sheriff, and to appoint triers as before. 3rd. That he refused to permit questions to be put to the special jurymen, as to whether they had expressed themselves adversely to the defendants before the trial, although (the special jury not being full) he did permit such questions to be put to the talesmen before they were sworn. The motion was supported by affidavits, stating the different grounds of the complaint against the master of the Crown-office and the sheriff. The Court said, no challenge can be taken either by the array or to the polls, until a full jury have appeared; and therefore, where the challenges are taken previously they are irregularly made. The disallowing of a challenge is not a ground for a new trial, but for a venire *de novo*, and every challenge must be propounded in such a way as that it may be put at any time upon the Nisi Prius record, so that the adverse party may either demur or counter-plead or deny the matter of challenge, in a jury which last case only triers are to be appointed; and, therefore, where the challenges were not put on record the defendants were held not to be in a condition to ask the opinion of this Court as a matter of right upon their sufficiency. There can be no challenge to the array on the ground of unindifferency in the master of the Crown-office, he being the officer of the court expressly appointed to nominate the jury. The only remedy in such a case is to apply to the Court by motion to appoint some other officer to nominate the jury. The master of the Crown-office, in nominating the jury, selected the names of the jurors, and did not take them by chance from the freeholders' book. He also took those only whose names had the addition of "esquire," or some other higher degree, and included some persons who were in the commission of the peace. Held, that in so doing he was perfectly right. He also included in his nomination some persons, who, as grand jurymen, had found the indictment, and persisted in his opinion as to their sufficiency, unless the crown would consent to abandon them, which was done, and others were substituted in their places. Held, that he was wrong in his opinion, but that there was no ground for presuming partiality. The sheriff's officer had neglected to summon one of the twenty-four special jurymen on the panel. Held, that this was no ground of challenge to the array of unindifferency on the part of the sheriff. Held also, that it is not competent to ask jurymen, (whether special jurymen or talesmen,) if they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but that such expressions must be proved by extrinsic evidence.

4. *MELLOR V. SPATEMAN*. M. T. 1668. K. B. 1 Saund. 344.

Per Cur. If a corporation bring an action, for any thing which they claim in their corporate capacity, it is a principal challenge to a juror that he is of affinity to any member of the corporation, though the corporation itself cannot have any kindred.

5. *ANON.* T. T. 1690. K. B. 1 Salk. 153. S. P. *REX V. EDMONDS*. E. T. 1821. K. B. 4 B. & A. 471.

Cooke being indicted for high treason, and the jury called, he offered to ask the jurors, in order to challenge them if they had not said he was guilty or would be hanged. *Per Cur.* This is a good cause of challenge; but then the prisoner must prove it by witnesses, not out of the mouth of the jurymen. A jurymen may be asked upon a voir dire, whether he hath any interest in the cause; whether he hath a freehold; for these do not make him criminal: but on the

the 25 Car. 2; his being sheriff *de facto* suffices.

So it is not competent to ask jury men if they have not previously to the trial

[741]

expressed opinions hostile to the defendants; and the sheriff's officer having neglected to summon one of the twenty-four special jury men returned on the panel is no ground of challenge to the

array for unindifferency on the part of the sheriff, nor can there be a challenge to the array, on the ground of unindifferency in the master or the grand officer, nor to the array or the poll before a full jury has appeared.

In an action by a corporation if a juror be of kin to any member, it is a principal challenge.

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In order to found a challenge to the poll

ground of a you shall not ask a witness or juryman whether he hath been whipped for larceny or convicted of felony; or whether he was ever committed to Bridewell for a pilferer; or to Newgate, for clipping and coining; or whether he is a villain or outlawed; because that would make a man discover that of himself which tends to shame, crime, infamy, or misdemeanour; so it is in this case, the answer would charge him with misdemeanour or misbehaviour.

6. ARGENT V. DARRELL. H. T. 1698. K. B. Salk. 648.

In ejectment after a trial at bar, it was moved for a new trial, because the verdict was contrary to evidence; the Court thought so too.

Per Holt, C. J. The reason of granting new trials upon verdicts against evidence at the assizes, is, because they are subordinate trials appointed by Westm. 2. c. 30. *Ubi de paucis articulis et facilis est examinatio*; and there have been new trials anciently, as appears from this, that it is a good challenge to the juror that he hath been a juror before in the same cause; but we must not make ourselves absolute judges of law and fact too; and there never was a new trial after a trial at bar in ejectment but in case of ill-practice, for the plaintiff may bring a new ejectment.

ANON. H. T. 1626. K. B. 1 Vent. 309.

A challenge to the jury in an information of forgery the defendant challenged one of the jury, for that the prosecutor had been lately entertained at his house; this was admitted to the favour, though against the King. (*Vide* for that in the 1 Cro. 663.) And then the counsel for the King challenged another, and were pressed to the King. allege the cause, for the 33 Edw. 1. does take away the general challenge; *quid non sunt boni pro Regis*.

The triers are sworn "well and truly to try whether A. the juryman challenged, stands in different between the parties to this issue."

X. RELATIVE TO THE TRIERS.*

ANON. T. T. 1688. K. B. 1 Salk. 152.

Upon a trial at bar, the question was, whether the fair called Way-hill fair should be kept at Way-hill or at Anderry's? And one of the jury was challenged because he lived at Way-hill; and the objection was, that the fair occasioned manure to improve the ground. On the other side, it was considered that the fair occasioned trampling of the grass. It being a challenge to the favour, two of the jurors were sworn to be triers, and their oath was, "you shall well and truly try whether A. (the juryman challenged) stands indifferent between the parties to this issue."

XI. RELATIVE TO PRAYING TALES.†

* These persons are viewed as officers of the court, and liable to be punished for any misdemeanours; Bac. Ab. tit. Juries.

† By 6 Geo. 4. c. 50. s. 13. it is enacted, that where a full jury shall not appear before any court of assizes or nisi prius, or before any of the superior civil courts of the three counties palatine, or before any court of great sessions, or where, after appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken for default of jurors, every such Court, upon request made for the King by any one thereto authorised or assigned by the court, or on request made by the parties, plaintiff or defendant, or tenant or their respective attorneys, in any action or suit, whether popular or private, shall command the sheriff or minister, to whom the making of the return shall belong, to name and appoint as often as need shall require, so many of such other able men of the county then present, as shall make up a full jury; and the sheriff or other minister aforesaid shall, at such command of the court, return such men duly qualified as shall be present or can be found, to serve on such jury, and shall add and annex their names to the former panel, provided that where a special jury have been struck for the trial of any issue, the talesman shall be such as shall be impanelled on the common jury to serve at the same court if a sufficient number of such men can be found; and the King by any one so authorized or assigned as aforesaid, and all and every the parties aforesaid, shall and may in each of the cases aforesaid, have their respective challenges to the jurors so added and annexed, and the Court shall proceed to the trial of every such issue with those jurors who were before empanelled, together with the talesman so newly added and annexed, as if all the said jurors had been returned upon the writ or precept awarded to try the issue of the case; King v. Barnard, 105. In that case it was objected that the coroners, in violation of the statute, which directed that the tales should be chosen *de circumstantibus*, had by letter requested persons to attend as jurors. The tales were taken from the common jury panel from which talesmen were usually summoned. The objection was overruled.

JENKINS v. PURCELL. T. T. 1738. K. B. 1 Stra. 707. S. P. 2 Saund. 349. d.

Whilst the jury were swearing, the defendant's counsel called for the record, and, finding a mistake in it, said they would make no defence. The plaintiff's counsel upon this, in order to avoid a nonsuit, and to save the costs, refused to pray a tale; and though twelve had been sworn, yet, there having been no actual prayer of a tale, the cause was suffered to remain for want of a juror.

XII. RELATIVE TO THE CONDUCT OF THE JURY AT AND AFTER THE TRIAL.*

1. *REX v. RENNER*. E. T. 1819. K. B. 2 B. & A. 462.

Upon the trial of an indictment for a misdemeanor, which continued more than one day, the jury, without the knowledge or consent of the defendants, separated at night. *Per Cur.* It is no part of this application that the verdict is contrary to the evidence, or that a different result could be expected from a new trial; but it is put on this ground, that the jury separated without the consent of the defendants, who knew nothing of the fact till after the trial. It seems to us, however, that this forms no ground for a new trial. In the course of a trial it frequently occurs that the judge is occasionally absent; and some of the jury take advantage of that opportunity to leave the court. Now if the mere separation for a night is a ground for vacating the verdict, it will be difficult to say why those short occasional separations should not have the same effect; but it would be a harsh conclusion that such a separation would avoid ground for a verdict. If, indeed, the jury separate improperly, the judge may impose a discretionary punishment upon them for their contempt in so doing; and if the case were one where the propriety of the verdict admitted of doubt, it should be very proper for the Court to take into consideration as an additional reason for granting a new trial, that the jury had so separated. But we are of opinion, that that circumstance standing alone is not sufficient to vacate the verdict. If we are wrong, the parties may bring a writ of error. For these reasons we are of opinion that there ought to be no rule.

2. *REX v. EDWARDS*. E. T. 1812. C. P. 4 Taunt. 309.

After the prisoner had been indicted and arraigned, and the jury charged, and while the prosecutor was giving his evidence, one of the jurymen fell down in a fit, and a medical man who examined him stated upon oath, that it would be improper for him to proceed with his duty as a jurymen on that day, whereupon Wood, B. discharged that jury, and directed a new jury to be sworn, consisting of the same eleven persons who remained of the former jury, and another. The counsel for the prisoner, upon a supposition that the jurymen would soon be in a state to return; had consented that another should be sworn in his room, but learning his inability to attend, he retracted that consent, and objected, that a jury having been once sworn and charged in a criminal case, they could not be discharged without giving a verdict, nor another jury sworn; but Wood, B. overruled that objection. The Court stopped the counsel who

* The jury, unless they can agree on the moment, are to withdraw from the court, to be kept together without meat or drink, fire or candle, and to have no intercourse with any person, whether interested in their decision or not, until they have agreed on their verdict; see Co. Lit. 272. m. But the jury may eat and drink, by leave of the Court, before they have agreed on their verdict; see Trials, per Pais, 348. If the trial of a cause be very long, it is usual for the Court, the consent of both parties being first obtained, to give the jurors leave to eat and drink during the trial, at their own expense, or at the equal expense of both parties; see 7 Bac. Abr. tit. Verdict, H. When the jury have left the box no new evidence can be adduced, nor can they recall a witness, and make him repeat his evidence; for though he give no more evidence than he had given in court, the verdict will not be allowed; see Metcalf v. Dean, Cro. Eliz. 189. * But they may have a witness recalled, to repeat his evidence in open court; see 2 Hale's P. C. 286. The jury may not carry with them any writing which was not given in evidence in open court; see Trials, per Pais, 357. After the jurors were gone from the box, one of them left his fellows and returned, with a copy of a court-roll in his hand, and told them that the merits, with which he was perfectly well acquainted, were with the plaintiff. Hereupon the other jurors, before of a different opinion, were prevailed upon by him to give a verdict for the plaintiff. The verdict was afterwards set aside.

[745] was to have argued for the crown, saying that it had been decided in so many cases, that it was now the settled law of the country, and gave judgment against the prisoner. See *Ann Scalbert's case*, Leach, 706.

If the jury take documents with them without leave of the Court and both parties, the verdict will be set aside. 8. *REX v. BURDETT*. H. T. 1696. K. B. 1 *Ld. Raym.* 148.

It was objected, that the jury took with them out of court an order of the Common Council, without the leave of the Court or consent of the parties; the counsel cited the case of my Lady Jay, where a verdict was set aside, because the jury took with them a map of the premises out of court.

Holt, C. J., Said, that it was a great crime in those who had done it; and he said, they sent him one of them by the penny post, but casting his eyes upon the title, he saw what it was and did not read it; but that was not fixed upon the informers; and if the delivery of papers by a stranger were sufficient to avoid a verdict, the case would never be decided.

Indeed it is a general rule, that the jury can not see or carry with them any other evidence than that which is delivered them by the Court, and by the parties themselves brought in to court and given in evidence. See 12 *Mod.* 320; *Bac. Abr.* Verdict.

4. *DUKE OF RICHMOND v. WISE*. H. T. 1670. K. B. 1 *Vent.* 125.

In an ejectment, the parties had a trial at bar, and a verdict for the plaintiff. The Court were moved to set aside this verdict, upon an affidavit made of these misdemeanors in the jury; viz. that they had bottles of wine brought them before they had given their verdict, which were put in a bill, together with wine and other things, which were eat and drank by the servants of the jury and the tippstaffs that attended them at the tavern, where they were consulting their verdicts. They said they were not upon a discretionary setting aside the verdict, as when the jury goes against evidence, but whether these miscarriages go against it in point of law. They all agreed, that if the jury ate or drank at the charge of the party for whom they find the verdict, it disannuls the verdict, but here it doth not appear that the wine they drank was at the order of the plaintiff or any agent for him. It is true in regard his solicitor paid for it afterwards it doth induce a presumption that he bespoke it; but that again is attenuated by its being put into the bill with other things that were allowable; and if the verdict should be quashed for this cause it must be entered upon the roll, that it was for drinking at the plaintiff's charge, and it was not proved that this wine was provided by him. And as to the other matter, that they received a treat from the plaintiff after their primary verdict given, and before it was given up in court, that shall not avoid their verdict.

5. *ANON.* T. T. 1703. K. B. 1 *Salk.* 405. *ANON.* E. T. 1702. K. B. 7 *Mod.* 3.

Per Cur. If a jury give a verdict on their own knowledge, they ought to tell the Court so. that they may be sworn as witnesses; and the fair way is to tell the court before they are sworn that they have evidence to give.

[746] 6. *HALE v. COVE*. M. T. 1795. K. B. 1 *Str.* 642. *S. P. Foy v. HORDEN*. M. T. 1671. K. B. 3 *Keb.* 805.

The jury having sat up all night, in the morning put two papers into a box marked P. and D., and so drew lots, P. came out, and they found for the plaintiff, which happened to be according to the evidence and opinion of the judge. Upon motion for a new trial, it was agreed that the verdict must be set aside; but the question was, whether the defendant should pay costs? The Court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence; but at last it was agreed, that the costs should wait the event of a new trial.

7. *ANON.* H. T. 1686. K. B. *Comb.* 14.

Irregularities in suing out a judgment in execution are to be tried by reference, &c.; but other matters subsequent to the judgment by *audita querela*. The Court denied to grant a new trial, upon affidavit that the jury went by the jurors' votes, though counsel said it had been granted in the like case. who could not agree on their verdict, determined by vote, and gave their verdict according to the greater number of votes, the verdict was held good;

8. *LAWRENCE v. BOSWELL*. T. T. 1748. K. B. *Say.* 100.

For, in such case, hav Upon a rule to show cause why a new trial should not be had, it appeared

* As where they throw dice for whom they should find a verdict; 1 *Freem.* 415.

that the jurors, not agreeing as to the finding of a verdict, voted for one; that once as the votes of seven of them were for finding it as it is found, and that no objection was made by the other five when the verdict was given. The rule was discharged; and by the Court: "Nothing was in this case determined by chance. The five jurors might ultimately be convinced by the seven; but if they only acquiesced in the finding of the verdict that is sufficient, and they shall not now be conceived to say that they did not acquiesce."

9. VAISE V. DELAVAL. M. T. 1785. K. B. 1 T. R. 11. S. P. OWEN V. WARBURTON. E. T. 1805. C. P. 1 N. R. 329.

Upon a motion for a rule to set aside a verdict, upon an affidavit of two jurors, who swore that the jury, being divided in their opinion, tossed up, and that the plaintiff's friends won, the case of Hall v. Cove, 1 Stra. 642, was cited. Per Lord Mansfield, C. J. The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanour, see 2 Stra. 834; but in every such case the Court must derive their knowledge from some other source, such as from some person having seen the transaction through a window, or by some such other means.

10. REX V. JANE D——. H. T. 1728. K. B. 1 Vent. 69.

Defendant was indicted for stealing several things; and pleading not guilty, and a jury sworn to try her, the witnesses not appearing were suspected to be tampered with by the prisoner; the jury were therefore discharged, and the trial put off. See 2 Hawk. Pl. 47.

an invariable rule, that a jury sworn and charged cannot be discharged without the prisoner's consent.

XIII. PAYMENT OF.*

CALDICOT V. PEMROKE. M. T. 1681. K. B. 2 Show. 248.

Ejectment. This cause was appointed for trial at the bar of this court, by a jury of Wilts, and a venire returned, and the jury summoned; but before the day the parties agree; and the summons not being countermanded, several of the jury appeared, and moved that they might have their charges. And it was ordered that the attorneys on both sides should pay them between them, as was usual in other like cases, as the Court said.

XV. RELATIVE TO OFFENCES CONNECTED WITH.

REX V. JOLLIFFE. M. T. 1791. K. B. 4 T. R. 285.

A criminal information having been granted against the defendant, he, before the trial at Nisi Prius, distributed hand-bills in the assize town, vindicting his own conduct, and reflecting on the prosecutor's. This matter being disclosed to the judge at Nisi Prius by an affidavit, was held a sufficient ground to put off the trial; and that affidavit being returned to this Court, they granted another information on it against the defendant.

XVI. RELATIVE TO EMBRACY.†

Justices of the Peace.‡

* Jurors in all civil causes are to be paid for their trouble and attendance, and the quantum is to be proportioned according to the distance of place, badness of the weather, &c. By 24 Geo. 2. c. 18. s. 2. no jurymen may take more than the sum of money which the judge who tries the issue shall think just and reasonable, not exceeding the sum of 11. 1s. except in causes wherein a view hath been or shall be directed.

† Under tit. Embracy, ante, vol. 8. p. 696. we have seen the definition of and punishment for the offence. Since that title was printed, the 6 Geo. 4. c. 50. has enacted, that every person who shall be guilty of the offence of embracy, and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against by indictment or information, and may be punished by fine and imprisonment in like manner as every such person and juror might have been before the passing of the act.

‡ Justices of the peace are appointed by the crown, and continue in office during the royal pleasure. Some of them are of the quorum; that is, certain business cannot be transacted without their presence. The powers and duties of justices depend on their commission, and on the several statutes which have created objects of their jurisdiction. They

If some of the jurors appear, and goes off pro defecto juratorum, those who appear are to be paid. If a defendant in a criminal prosecution endeavours to influence the jury by distributing handbills in the assize towns or otherwise, it is an indictable offence. [748]

I. JURISDICTION OF IN GENERAL, p. 750.
 II. PARTICULAR INSTANCES.

- (A) RELATIVE TO APPRENTICES. See *ante*, tit. Apprentices.
 (B) HIGHWAYS. See *ante*, tit. Highways.
 (C) LIBELS. See *post*, tit. Libel.
 (D) POOR. See *post*, tit. Poor.
 (E) IN SESSION. See *post*, tit. Session.
 (F) TRESPASS. See *post*, tit. Trespas.

III. POWER AND DUTY OF, p. 755.

[749] IV. EFFECT OF NOT BEING DULY QUALIFIED, p. 757.

V. WHEN HE MAY ACT SEPARATELY, OR JOINTLY, p. 758.

VI. PRIVILEGES OF, p. 758.

VII. ORDERS AND DIRECTIONS OF IN GENERAL, p. 759.

VIII. PARTICULAR INSTANCES.

- (A) RELATIVE TO BASTARD, See *ante*, tit. Bastard.
 (B) HIGHWAYS. See *ante*, tit. Highways.
 (C) POOR-RATE. See *post*, tit. Poor.

are commissioned to preserve the peace, to suppress riots and affrays, to commit felons and inferior criminals; and two or more of them may inquire into and determine felonies and other misdemeanors. Their duties have greatly increased by late acts of parliament, especially in sessional business, in regulating gaols and houses of correction, in taking cognizance of various offences against the vagrant, game, and revenue laws, and in the licensing of public houses. Every justice must have an estate of 100*l.* per annum, clear of incumbrance; and, if he act without such qualification, he forfeits 100*l.* But this does not extend to corporation justices, peers, privy counsellors, judges, under-secretaries of state; nor to the heads of colleges in the two universities, or mayors of Oxford and Cambridge. No practising attorney, solicitor, or proctor, is qualified to act as justice for any county. A justice of the peace acts ministerially or judicially. Ministerially, in preserving the peace, hearing charges against offenders, issuing summonses or warrants thereon, examining the informant and his witnesses, binding over the parties to prosecute and give evidence, bailing the supposed offender, or committing him for trial. Judicially, as when he convicts for an offence. His conviction, drawn up in due form and unappealed against, is conclusive, and cannot be disputed by action: though if he act illegally, maliciously or corruptly, he is punishable by information or indictment. When a criminal information is applied for against a magistrate, the question for the Court is not whether the act done be found on investigation not strictly right, but whether it proceeded from an unjust, oppressive, or corrupt motive (among which fear and favour are generally included), or from mistake or error only. Justices are empowered in various cases to issue warrants of distress for the recovery of penalties on convictions before them. And by the 5 Geo. 4. c. 18. where it appears that sufficient distress cannot be had, the justices may, without issuing such warrant of distress, commit the offender to prison. By 1 & 2 Geo. 4. c. 68. justices of counties, ridings, or divisions, may act within any city, town, or other precinct, having exclusive jurisdiction, but not being counties themselves within their district. The 7 & 8 Geo. 4. c. 62. more accurately defines the powers of justices in giving bail on charges of felonies, and also requires them to take the most material part of the evidence on examination before them in writing, both in charges of felony and misdemeanor. There are many statutes made to protect justices in the discharge of their duties. Such as prohibit them from being sued for any oversight without prior notice, and to stop all suits begun on tender made of sufficient amends. But, on the other hand, any malicious or tyrannical abuse of their office is severely punished; and persons recovering a verdict against a justice for any wilful and malicious injury are entitled to double costs. The police justices of the metropolis are stipendiary magistrates, which, exclusive of those at Bow-street office, were created by act of parliament in 1792. They are twenty-seven in number, appointed and salaried by the crown. Their general duties, like those of the unpaid magistrates of the country, are the preservation of the peace, the prevention of crimes, the apprehension of offenders, and their examination and commitment to prison. One or more of the police magistrates are required to attend every day, except Sunday, from ten o'clock in the morning until eight o'clock in the evening; and not fewer than two justice are to attend every day at each office, from twelve o'clock at noon until three in the afternoon. By the 6 Geo. 4. c. 21. the salaries of the police justices are increased from 600*l.* to 800*l.* per annum. By the same act they are empowered, on the application of five inhabitants of any street, or the proprietors of any place of public resort, to appoint a competent number of constables, recommended by the applicants and approved by the justices, to keep the peace in such street or place of public resort; the wages of such constables to be paid by the inhabitants or proprietors respectively.

- IX. REMOVAL OF ORDERS AND DIRECTIONS. See *ante*, tit. Certiorari.
- X. APPEALS FROM ORDERS AND DIRECTIONS. See *post*, tit. Session.
- XI. INFORMATIONS BEFORE, p. 762.
- XII. CONVICTION BY. See *ante*, tit. Conviction.
- XIII. COMMITMENTS OF. See *ante*, tit. Commitment.
- XIV. WARRANTS OF. See *post*, tit. Warrant.
- XV. PROCEEDINGS AGAINST.

(A) BY ACTION.

- (a) Notice of. See *ante*, tit. Action, Notice of.
- (b) When a justice is liable to, and form of, p. 762.
- (c) Within what time to be brought, p. 766.
- (d) Declaration, p. 767.
- (e) Tender of amends and paying money into court, p. 767.
- (f) Pleas, p. 769.
- (g) Evidence, p. 769.
- (h) Damages, p. 770.
- (i) Costs, p. 770.

(B) BY CRIMINAL INFORMATION, p. 771.

I. JURISDICTION OF IN GENERAL.

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- 1. *REX V. SAINSBURY*. M. T. 1791. K. B. 4 T. R. 451; S. C. Nolan Rep. 8.

On an indictment, it appeared that the corporation of London was a corporation by prescription. It set forth three different charters; 1 Edw. 3. 23 Hen. 6. and 4 Edw. 6; by which, *inter alia*, the mayor, recorder, and such of the aldermen of the city as have passed the chair, are appointed justices of the peace for the town and borough of Southwark; but neither of these charters contained a non-intromittent clause, as for the justices for the county of Surrey; that the mayor, and alderman of the city that have borne the office of mayor, and the recorder for the time being, have been used and accustomed to hold sessions of the peace within and for the town and borough of Southwark, four times in every year, and for forty years and upwards have licensed persons to keep alehouses in the said borough or town, but they have not been accustomed to be justices of the peace there in any other manner. That the town and borough of Southwark is within the county of Surrey; and the justices appointed for the county have been accustomed to act in Southwark, and to license persons to keep alehouses therein. That the general quarter sessions have been usually holden once in every year within this borough, and the three other sessions in other different places in the county. The verdict then stated, that A., B., C., D., &c. (the justices for the counties mentioned in the indictment), were, on the 4th and 11th of September, 1787, justices of the county of Surrey, and acting in and for that division in which Southwark lies. That certain justices of the county acting in and for the division in which Southwark lies, on the 15th of August, 1787, issued their warrant, under their hands and seals, and appointed a general meeting of the justices of the county acting in and for the said division, to be holden on the 6th of September then next following, at a certain place therein mentioned, for the purpose of licensing persons to keep common inns and alehouses within the said division; and that in pursuance of such warrant the said general meeting in the said indictment mentioned was held on the said 6th of September, by and before A. B., C. D., &c. That at the meeting, J. Hedger applied to those justices for a license, who did not grant it, but postponed the further consideration of it till the 11th of September, to which day that meeting was adjourned. That at the adjourned meeting, held, &c. those justices refused to grant a licence to J. Hedger. That on the 25th of August, the defendants then being the mayor and alderman of the city of London, who had passed the chair, had issued their warrant for holding a general meeting of the justices in and for the town and borough of Southwark, on the 14th of September then next, at a certain place within the borough, for the purpose of granting licences, &c.; in pursuance of which a meeting was held by the defendants on that day, which was adjourned to the 18th of September, when they granted a li-

cence to Hedger. That at this adjourned meeting, and before the defendants licensed Hedger, they had notice of the general meeting of the justices of the county, and of their having refused to grant Hedger a license. The Court held, that where by charter the mayor and some of the aldermen of London have jurisdiction in Southwark, but the charter contains no non-intromittent clause as to the justices of the county of Surrey, the latter have a concurrent jurisdiction with the former.

2. *RATES v. WINSTANLEY*. M. T. 1815. K. B. 4 M & S. 429.

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Where jurisdiction was granted by charter to the borough justices within the borough in exclusion of the county justices, and jurisdiction was likewise given to them over a place within the limits of the borough, but not in exclusion of the county justices, it was held that the county justices might assess such place to the county rates. And if jurisdiction be given to the borough magistrates over a district not within the borough, without expressly excluding the jurisdiction of the county magistrates, the former have a concurrent jurisdiction only with the latter, and not an exclusive one.

By charters Edw. 4. & Hen. 7. to the borough of Leicester, the borough justices have exclusive jurisdiction within the borough, with a non-intromittent clause as to the county justices; and, by another charter (Eliz.) all houses, &c. within the parish of St. Mary, in Leicester, are put under the government and jurisdiction of the borough justices, saving to all persons their rights and jurisdictions. The Court held, that the justices for the county of Leicester might well impose a county rate upon a part of the parish of St. Mary, which lies within the county, and within the borough, although a rate, in the nature of a county rate, had been previously imposed for the same time by the borough justices; and although it appeared that in one instance only, in 1684, this part of the parish had contributed to the rate for the county at large; and that from 1768 to the present time, rates in the nature of county rates had been assessed upon the parish at large by the borough justices; for, before the charter of Elizabeth, this part of the parish could not have been contributory to the borough rates, and must have been, by law, contributing to the county rates; and the charter did not vary the place to which it should contribute from the county to the borough; and though there was no poor-rate, or petty constable, or other peace officer for this part of the parish, out of which the rate might be levied by stat. 12 Geo. 2. c. 29. yet the statute does not, on that account, transfer the right from the county to the borough justices; and the 44 Geo. 3. c. 31. s. 19. (local act) supplies any defect which there might be in 12 Geo. 2. c. 29. to warrant the levy.

3. *BLANNEY v. WINSTANLEY* E. T. 1789. K. B. 3 T. R. 279.

On the question whether, under a charter, jurisdiction to borough magistrates over a district not within the borough did exclude county justices, without express words? *Per Cur.* In the decision of this case, which comes before the Court on a special verdict, we are bound to determine on the facts found by the jury, and cannot infer any thing. We entirely agree with the doctrine laid down in *Darwing v. Upton*; but that case differs from the present in the manner in which it came before the Court. That came on on a motion for a new trial, which the Court refused to grant, because the second verdict must have been the same as the first, on the justice of the case. But this case comes before us on a special verdict, where we cannot presume any thing that does not appear upon the record. Laying that argument, therefore, out of the case, we must consider the facts which are found by the jury. The verdict states that the Bishop's Fee was no part of the borough of Leicester previous to the charter of Elizabeth: if not, then the question must turn on the true construction and meaning of that charter; in deciding which two things are to be considered:—1st. The words of the charter; and, 2ndly. The usage which has prevailed since. As to the first, nothing but express words can exclude the county justices; but here are no such words; and it is a very material part of the case, that even by that charter the Bishop's Fee is not made part of the borough. In the saving clause the charter gives the borough justices a power of acting within a certain district not within the borough, which cannot exclude the justices of the county, who had jurisdiction there before. And this is confirmed by the saving clause, which expressly reserves all former rights. Then, with regard to the usage: usage consistent with the provisions of the charter has prevailed for 190 years past; and if the words of the charter were more disputable than they are, we think that ought to govern this case. There are cases in which this Court has held, that a settled usage would go a great way to control the words of a charter. Such was the

case of *Glope v. Handley*, in which the Court went much farther than is necessary in the present case; and it is for the sake of quieting corporations that this Court has always upheld long usage where it was possible, though recent usage would not, perhaps, have much weight. But, without having recourse to the usage in this case, on the words of the charter alone we think the county justices are not excluded, there being no express words for that purpose.

4. *BANE v. METHUEN*. E. T. 1824. C. P. 2 Bing. 63.

The plaintiff sued the defendants (two magistrates and a constable), in trespass for an apprehension and detention. At the trial before Justice Best the neglect of summons stated in the warrant having been proved, and also that the magistrate, after the apprehension of the plaintiff, convicted him of a malicious trespass, under the statute Geo. 4. c. 56. the learned judge directed a nonsuit, with liberty for the plaintiff to move to enter a verdict, it having been urged on his part, that there was no clause in the above act of parliament authorizing the magistrate to apprehend him till after the conviction. Afterwards cause was shown against the rule. *Per Cur.* In the case of *Shergold v. Holloway*, 2 Stra. 1002. cited, the magistrates have no jurisdiction; in the other case of *Hill v. Bateman*, 1 Stra. 711. the proceedings ought to have been by distress; but, by the general law, a magistrate cannot decide *ex parte*, and is therefore bound to summon the party charged with an offence. If he omits to appear, a warrant to apprehend becomes necessary to enforce summons, and such a warrant the magistrates are authorized to issue. It is clear, that when an act of parliament gives a justice jurisdiction over an offence, it impliedly gives him a power to make out a warrant, and bring before him any person charged with such offences; Hawkins, P. C. b. 2. c. 13. s. 15; 12 Rep. 131. b; the *Queen v. Simpson*, 10 Mod. 248. Rule discharged.

6. *REX v. CLARKE*. E. T. 1774. K. B. Cowp. 35.

Per Cur. This is a conviction for playing at bowls, and the punishment on the offender is imprisonment, as being an idle and disorderly person. The stat. 33 Hen. 8. c. 9. s. 16. lays a penalty of 20s. on every labourer, &c. playing at bowls out of Christmas. The punishment, therefore, not under this statute. The statute 17. Geo. 2. c. 5. s. 2. describes four kinds of idle and disorderly persons, and being an explanatory act, we cannot go out of it. Now, bowling is not a defence within any of these descriptions; consequently the defendant is not punishable as an idle and disorderly person. Therefore we are all clearly of opinion that the conviction ought to be quashed.

6. *REX v. MORGAN*. 1788. Cald. 156. *REX v. BORRON*. H. T. 1820. K. B. 3 B. & A. 432.

Per Cur. Unless facts are stated to make the contrary appear, the Court always presumes in favour of inferior jurisdictions.

7. *REX v. BRODERIP*. H. T. 1826. K. B. 7 D. & R. 861; S. C. 5 B. & C. 239. 8. P. *REX v. BUCKINGHAM*. Justices. E. T. 1823. K. B. 2 D. & K. 689; S. C. 1 B. & C. 485. *REX v. FARRINGTON WITHOUT*. Justices. 4 D. & R. 735.

Per Cur. How can we order a magistrate to do that which may subject him to an action? If a justice of the peace criminally forbears to discharge his duty, he is amenable for his conduct by information, as for a public offence; but that is a very different thing from commanding him to do that which may subject him to an action.

III. POWER AND DUTY OF.

1. *PARSON v. BLONDY*. E. T. 1810. E. Ex. Wighw. 22.

The defendant having levied a double toll upon a waggon belonging to the plaintiffs, they made application to two justices of the peace, in pursuance of the direction of the Bath act, who upon hearing the complaint, adjudged the single duty only to be due; and the defendant refusing to repay the over-toll.

* If justices of the peace adjourn the proceedings to a day subsequent to the repeal of an act of parliament under which they act; their jurisdiction will cease; *REX v. London Justices*, 3 Barr. 432.

When a statute gives a magistrate jurisdiction over an offence, it impliedly gives him power to make out a warrant and bring before him any person charged with such offence.

Justices have no jurisdiction to punish persons convicted of playing at bowls, as disorderly persons.

[753] Unless facts are stated to make the contrary appear, the Court always presumes in favour of inferior jurisdictions.* If a justice entertain a reasonable doubt of his jurisdiction, the Court will not compel him to do an act which may subject him to an action. Whenever a power is given to

their decision is final unless an appeal is expressly given.

the plaintiffs sought to recover it by an action of *assumpsit*, which was tried before Graham, Baron, at the assizes for the county of Somerset; and a verdict having been found for the plaintiff. Counsel on a former day obtained a rule to show cause why it should not be set aside and a nonsuit entered; first, because the proper remedy in this case, under the Bath act, was by an appeal to the quarter sessions; secondly, if the action of *assumpsit* would lie, still notice ought to have been given pursuant to the directions of that act.

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Per Cur. With regard to the first point, namely, appealing to the quarter sessions, if that is the proper relief, this action will not lie; but if we read this act right, there is no appeal in the present case; there is a particular remedy given, namely, an application to two magistrates. As to notice, this is not an action for any thing done in pursuance of the act; the moment the two justices had determined this case, and ordered the return of the money, this right of action accrued, and not before. The act is not clear; but from the best opinion we can form from it, this is not a case that requires notice.

2. *BROOKSHAW v. HOPKINS.* E. T. 1772. K. B. Lofft. 240.

A justice may commit for a breach of the peace in his view or for an apprehended breach, without warrant or information;*

On the motion for a rule to discharge a nonsuit, argued against the motion, that the defendant, Mayor of Shrewsbury, and by consequence, justice of the peace, by virtue of his office. That if the merits could be gone into, the defendant had behaved with the greatest civility. That one Langton complained of some ill-behaviour of the plaintiff. That the plaintiff terrified Langton's wife, who was with child, exceedingly. That the defendant sent expresses to the relations, who took the plaintiff, and confined him in a mad-house for six months. Nonsuit of the plaintiff for default of notice; and also for that the plaintiff did not bring his action within six months. It was said, that as to the necessity of a complaint in writing, the meaning of the statute was, that the justice might not be compelled to give evidence of a complaint or information which he did not keep in his memory for ever.

The Court, after commenting on the facts, said, that for a manifest breach of the peace, in their view, a justice might commit without warrant.

3. *WILLES v. BRIDGER.* H. T. 1819. K. B. 2 B. & A. 278.

And he may require sureties of the peace for a limited time according to his discretion, and need not bind the party over to the next sessions only.

On the question whether a justice of the peace was authorized to require surety of the peace for a limited time according to his discretion, without binding the party over to the next sessions only. It was said,

Per Cur. The power of the justices assembled at their sessions to make surety for the peace is derived from their commission, and is found in the first clause or assignment of the commission, and by that clause the power is given to any one justice, and not to two or more, as is done by the second clause, which relates to the taking and trial of indictments, and some other matters; and, therefore, if a single justice cannot take surety for a longer period than till the next sessions, it will be difficult to show that a number of justices assembled at sessions may take it for a longer; and unless they can do so, then as it may be in most cases expedient that the period of a surety should be longer than the interval between sessions and sessions, both parties, or at least the party required to give the surety and his recognizers must be harassed by repeated attendances to accomplish an object which may as well be effected by a single attendance, at which the whole matter may be heard and discussed. It may in some cases be expedient that the time and amount of the security should be settled by the concurrent sentiments of several persons rather than the single opinion of one individual; and, therefore, we would by no means be understood to disapprove of the usual practice, which is to take the security until the next sessions only. On the other hand, expense and trouble are saved by adjustment of the whole matter in the first instance, and, therefore, there may be other cases in which this may be the most convenient course.

4. *REX v. HARRUP.* E. T. 1822. K. B. 1 D. & R. 222.

Habeas corpus to be discharged from a commitment by one justice under 1 Geo. 4. c. 36., an act for the summary punishment in certain cases of per-

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Under the statute 1 Geo. 4. c. 36. justices

* Or he may commit on a complaint not in writing; *Brookshaw v. Hopkins*, Lofft. 234.
† As to prevent an intended prize-fight; *Rex v. Bellingham*, 2 C. & P. 234.

sons wilfully or maliciously damaging or committing trespasses on public or private property. It enacts, "that if any person or persons shall wilfully or maliciously do or commit any damage to any building, &c. and be thereof convicted before any justice, &c., he, &c. shall forfeit and pay to the person or persons aggrieved, such a sum of money as shall appear to the justice to be a reasonable satisfaction and compensation for the damage committed, not exceeding in any case the sum of 5*l.*, which sum shall be paid, &c.; and in default of paying the same shall be committed to the common gaol or house of correction, for any time not exceeding three months, unless the same is sooner paid. The defendant had been committed under a warrant, reciting "that one Matthias O'Neil had made complaint to the justice, that he had lost a post or pale out of his fence, and that he had cause to suspect, and did suspect, that Elizabeth Harpur, on whose premises the same was found, did cut, spoil, and take & carry away the same; and that whereas the said Elizabeth Harpur did on, &c. appear before the justice, and not giving the justice any satisfactory account how she came by the post, nor producing the party of whom she bought it, nor any credible witness to testify the sale, she was, therefore, by him committed for wilfully and maliciously carrying away the same, and was adjudged to pay the sum of 5*l.*, and in default of payment, was committed for three calendar months, there to be kept to hard labour, unless the said sum of 5*l.* was sooner paid." An affidavit was produced on behalf of the defendant, denying that she had cut or spoiled the post in question, and stating her entire innocence of the charge imputed.

Per Cur. This commitment is clearly bad. The charge recited is, that the defendant had cut, spoiled, and taken away the post, and the justice convicts her of carrying it away. It is perfectly consistent with the statement in the commitment, that somebody else may have cut and spoiled the post, and that accused might have carried it away, which is no offence within this act. Therefore, as she is convicted of no offence, she must be discharged. We observe that the defendant is adjudged to pay a sum of 5*l.*; it may be that the injury done did not amount to so much. The sum to be awarded must be in proportion to the amount of the injury. The nature of damages within the meaning of the act of parliament does not seem to have been understood

5. *REX V. WELTZIE.* E. T. 1809. N. P. 2 Campb. 142.

This was an indictment for saying of Girdler, a justice of peace for the county of Middlesex, that he was a scoundrel and a liar. The words were charged to have been spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity.

Lord Ellenborough. The words not being spoken to the justice, I think they are not indictable. This doctrine is laid down by Lord Holt, in the case of *Regina v. Wrington*, 2 Sulk. 698; and in *Rex v. Pocock*, in 2 Strange, 1157. the Court of King's Bench refused to grant an information for saying of a justice in his absence that he was a forsworn rogue. However, I will not direct an acquittal upon this point, as it is upon the record, and may be taken advantage of in arrest of judgment. It will be for the jury now to say, whether these words were spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity; for if they were not, this indictment is not supported, and it could not by any possibility be a misdemeanor merely to utter them, although the prosecutor's name may be in the commission of the peace for the county of Middlesex.—The defendant was acquitted.

6. *REX V. BORRON.* H. T. 1820. K. B. 3 B. & A. 432.

Per Cur. On inquiries before justices, an attorney has no right to be present except as a matter of courtesy.

7. *COX V. COLERIDGE.* M. T. 1822. K. B. 2 D. & R. 86; S. C. 1 B. & C. 37.

On the question whether a person under examination before justices of the peace, on a charge of felony, has a right to have a legal adviser attending on

* *Qs.* Whether a justice has a right to commit for a contempt when not sitting in court, might *Forster v. Addington*, Peake, 62.

may award satisfaction for a malicious injury to the amount of 5*l.* but in each particular case the extent of the injury is to be ascertained by the justices, and compensation awarded only in proportion to the injury done.*

And it seems that an indictment will not lie for words spoken of a justice of the peace in his absence.

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On inquiries before justices, an attorney has no right to be present, except as a matter of courtesy; And it seems that a justice

bly turn
such a per-
son out of
the justice
room;

his behalf, and to cross-examine the witnesses for the prosecution, and to examine opposing testimony to prove his innocence. It was said,

Per Cur. We do not found our opinion upon any distinction between attorney and counsel; but we form it upon the principle, that upon the examination before the magistrates on a charge of felony, the party accused has no right to insist upon having the presence of a legal adviser as a matter of right. Our opinion is, that neither the prisoner on the one hand, nor the prosecutor by whom the charge is made, on the other, has any right to have a legal adviser present; and in giving this opinion, I have had in view the provisions of the statute 1 & 2 P. & M. c. 13. s. 4. That statute points out in explicit terms the duties which the magistrates are called upon to discharge. They are "to take the examination of the prisoner, and the information of those persons who bring him before them on the charge of felony; and the fact and circumstances thereof, or as much thereof as shall be material to prove the felony, shall be put in writing." We are by no means satisfied with those authorities which have been relied upon by the counsel for the defendants. We differ from those authorities which say that the magistrate has no discretion, and that he is not to judge of the probability of the case and of the credit of the witnesses who are brought before him to support a charge of felony. We think the magistrate has a right to exercise his own discretion in such cases to commit the party, unless he thinks there is a *prima facie* case made out by witnesses whom he may think entitled to a reasonable degree of credit. But when that is the case, it is his duty to commit. The magistrate is generally a man of good education, and who, to a certain degree, possesses legal notions, and he is bound to act impartially between the prosecutor on the one hand, and the prisoner charged on the other. If the person charged is really innocent, he would be competent, however ignorant, to suggest to the magistrate such topics as he thought would be of advantage to him, in order that the magistrate might sift the story to the bottom; and the magistrate standing indifferent between the one side and the other, is the only legal adviser which the party has a right to insist shall be present at the time of the inquiry. There are many instances in which, in the exercise of a just discretion, the magistrate would give to the party the privilege of having a professional person present on his behalf; but still we should say that that was a privilege only, and not a right, and that the magistrate is to exercise his own discretion upon the subject. No person has a right to say, against the will of the magistrate, "I shall force myself upon you, for I have a right to conduct the case on the part of the prisoner, against whom the charge is made." We think the justice might turn him out of the room, and exclude his presence during the investigation of the case.

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And the
Court have
refused to
grant a
criminal in-
formation
for such ex-
pulsion.

Though it
would be
doubtful
whether
the same
rules apply,
when the
decision of
the justice
is to be fi-
nal.

8. *REX v. JUSTICES OF STAFFORDSHIRE.* H. T. 1319. K. B. 1 Chit. Rep. 217.

Criminal information against two justices of Staffordshire. The grounds in support of this motion were principally, that the magistrates had deprived the defendants of the advantage of legal assistance, by ordering their attorney out of court, and keeping him excluded from the justice room during the hearing of the information. It was also objected, that the accusation was informal, and the innocence of the parties was expressly sworn to; but the affidavits imputed no corrupt motive to the magistrates, other than that of turning the attorney out of the room. Bayley, J. What right had the attorney to be there? His presence would only produce confusion and irregularity in the proceedings of the magistrates. An attorney has no right to interfere with the duties of the magistrate in his own justice room. See 1 Chit. 217.

9. *COX v. COLERIDGE.* M. T. 1822. K. B. 2 D. & R. 86.

An attorney of this court was retained by a prisoner charged with a felony, to attend and give him his advice and assistance during his examination before justices, and after notice to the latter that he attended upon such retainer for that purpose, The Court doubted whether the rule of exclusion applies where the decision of the justices is final, as on conviction under penal statutes no appeal being given. See *ante*, tit. Attorney.

IV. EFFECT OF NOT BEING DULY QUALIFIED.

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THE MARGATE PIER COMPANY V. HANNAM EXECUTORS. M. T. 1819. K. B. 3 B. & A. 266.

This was an action of trespass, brought for levying certain poor-rates for the parish of Saint John the Baptist, in the Isle of Thanet. There had been three rates all regularly made and published. Two of the three had been duly allowed by two of the justices of the cinque ports; the third was allowed by the defendants, Hannam and Dyson, acting as such justices; the warrants of distress had been issued by these defendants, and executed by the other two defendants, one of whom was an overseer of the poor, and the other a constable of the parish. Copies of the warrants had been demanded, and notice of the action given. A case was reserved at the trial of the cause, upon two questions: 1st. Whether the plaintiffs were liable to be rated for the relief of the poor. 2ndly. Whether the acts of the defendant Dyson, as a justice of the peace for the liberties of the cinque ports, and was not duly qualified in the matter in question, were void or not. The Court held that his acts were not absolutely void; and therefore persons seizing goods under a warrant of distress signed by a justice who had not taken the oaths at the general sessions, nor delivered in the certificate required, were not trespassers. See 5 D. & R. 654; and 3 B. & C. 762.

The acts of a justice of the peace who is not duly qualified are not absolutely void.

V. WHEN A JUSTICE MAY ACT SEPARATELY OR JOINTLY.

1. **REX V. FOREST.** H. T. 1789. K. B. 3 T. R. 38; **S. P. REX V. GREAT MARLOW.** H. T. 1802. K. B. 2 East, 244. **S. P. REX V. HAMSTALL RIDWARE.** T. T. 1789. K. B. 3 T. R. 380. **S. P. WOOTTON V. HAMEY.** H. T. 1805. K. B. 6 East, 75.

Ashhurst, J. The justices, in appointing overseers, do not act ministerially; the statute has vested a discretion in them, and they should act together. This is not a mere ministerial act; if it were, the justices would have nothing more to do than to confirm the appointment presented to them by the parishioners; but they are to exercise a discretion upon this. And the general rule is, that when an act of parliament requires the concurrence of two magistrates, they should both act together.

When a statute empowers two justices to execute a judicial act, they must meet and execute it together; but where the act is merely ministerial, it may be executed separately.

2. **REX V. HOLFIELD.** E. T. 1792. K. B. 6 T. R. 596.

M. Shaw, the pauper, was born at Stotfield, in 1741; his father, who died about 20 years since, was then, and continued to the time of his death, a settled inhabitant of Chilvers Colton and the pauper M. Shaw had acquired no settlement in his own right, except in the manner following: The pauper was removed in the year 1776, with his wife and five children, none of whom, nor any of the other children named in the present order, have gained any settlement in their own right from Sandon, in the county of Hertford, under an order of removal in the usual form, to Stotfield. The parish officers of Sandon took this order and the paupers immediately to Stotfield, and there delivered them, with the order, to the parish officers of Stotfield, by whom they were received;—and against that order there was no appeal. The pauper with his family has ever since, till the present removal, occasionally resided in and been relieved by the parish of Stotfield. It was then proved on the part of the respondents (after hearing counsel for the appellants, who objected to the evidence as inadmissible, but which objection was overruled by the Court) that the order of removal from Sandon to Stotfield, and the examination on which that order was founded, in fact signed and taken by the two justices, separately, and not in the presence of each other; and that one of the two justices, though a magistrate for the county of Hertford, took the examination and signed the order at his own house, situate in that part of the town of Royston which lies in the county of Cambridge; Royston being partly in the county of Cambridge and partly in that of Hertford. The Court held the order voidable, not void.

But an order of removal signed by two justices separately and in different counties is only voidable, not void.*

* And trespass does not lie against one magistrate for committing the mother of a bastard child to prison for refusing to filiate it, without the previous notice of action required by stat. 42 Geo. 3. c. 24; although the jurisdiction in such matters is given by 18 Eliz. c. 212. to two magistrates only; Bird v. Ganders, Hallloch's Costs, 240..

VI. PRIVILEGES OF.

1. *REX v. SKINNER*. T. T. 1771. K. B. Loft, 55.

Blanderous words, spoken by them in the discharge of their duty, are not actionable. On a motion to quash an indictment against —Skinner, Esq, one of his Majesty's justices of the peace of the town of Poole, for scandalous words spoken by him, in a general session of the county, in which he said to the grand jury, "You have not done your duty; you have disobeyed my commands; you are a seditious, scandalous, corrupt and perjured jury."

Per Cur. The words are extremely improper. If the party were not a borough justice, we should think there might be grounds to apply to the great seal to remove him from his office; but to proceed by indictment would be subversive of all ideas of a constitution. If any precedent should be found, time shall be given to make use of it. It would be improper to quash the indictment immediately.

2. *TUCK EXECUTOR v. RUGLES*. E. T. 1804. N. P. 5 Esp. 237.

Nor is an individual justice liable to pay for expenses incurred in executing things ordered by the session of which he was a member. [760] This was an action of *assumpsit* for work and labour done by the testator, as an architect. A committee of the justices acting for the division was appointed, one of whom was the defendant Ruggles. Carter, the testator, in his life-time was an architect, and had, with others, sent in his plans and estimates, and his were adopted by the committee. There was no time fixed for the commencement of the work, and it was afterwards abandoned, and this action was brought to recover a sum of 500*l.* for the plans and estimates which had been given in and approved of. For the defendant, it was contended that the action could not be supported; that the action was against the defendant acting as a magistrate in sessions, for an act done as one of the magistrates acting for the division. The case of *Macbeath v. Haldiman*, 1 T. R. was cited to show that a man acting under the authority of government, and not on his own account, was not liable, and it was urged that the defendant was acting here in that character. The statute 20 Geo. 3. c. 54. was cited respecting the building of gaols, and a power is there given to provide for the expenses. That the defendant here was, therefore, acting only under the act, and as a member of the committee; vide *Rex v. Glamorgan*, 5 T. R. 279.

Mansfield C. J., ruled, that the action was not maintainable; that all that had been done was done by the defendant as a member of the quarter sessions; and that a single magistrate could not be liable. It was not the act of defendant in his individual capacity, or as a single magistrate, but the joint act of the sessions.—Nonsuit.

VII. ORDERS AND DIRECTIONS OF IN GENERAL.

1. *REX v. INHABITANTS OF FARINGDON*. E. T. 1788. K. B. 2 T. R. 471. S. P.*REX v. CLAYTON*. M. T. 1802. K. B. 3 East, 58. S. P. *REX v. AIRE AND**COLDER NAVIGATION*. H. T. 1789. K. B. 2 T. R. 660.

Every thing is to be intended in support of an order of justices.* *Per Cur.* If a certificate is to be compared to an order of justices which it strongly resembles, it must be held sufficient, because every thing is to be intended in support of it.

2. *REX v. INHABITANTS OF HALCOTT*. M. T. 1796. K. B. 6 T. R. 587.*

But an order is void if it do not appear on the order itself that the justices had jurisdiction to make it. *Per Cur.* In the last case which was decided on the rigid rules of law, it was held that the order was void, because it did not appear on the order itself to be cause within the jurisdiction of the magistrate.

3. *WELCH v. NASH*. E. T. 1807. K. B. 8 East, 394.

Under the 19th section of the General Highway Act, 13 Geo. 3. c. 78. a new highway must be set out before an old one can be stopped up.

Lord Ellenborough C. J. This is a question of jurisdiction. The magistrates have only jurisdiction conferred on them in a given case. They may divert an old road, so as to make it nearer or more commodious to the public;

* And where justices covenanted by deed that the treasurer of the county should pay the plaintiff a certain sum under an act of parliament, which directed that all actions or proceedings connected with the execution of the stat. should be brought in the name of the clerk of the peace, it was holden that the justices were not liable; see *Allen v. Watergrave*, 2 Meese, 621.

that is, by making a new road. The whole section contemplates that a new highway is to be made in lieu of the old one, which is to be stopped up, and the magistrates can only order the old highway to be stopped up on the condition that a new highway has been made and put in a proper state. But what diverting or turning of the old road has been in this case? Or what new highway has been given in lieu of the old one which is stopped up? The facts are simply these. The magistrates have extinguished and stopped up an old road, and have enlarged another in different parts of it; but the *termini a quo* and *ad quem*, and the direction of it, remain the same as before. Increasing the width of one old highway is neither diverting another old highway nor making a new one, and the justices cannot make facts by their determination in order to give to themselves jurisdiction contrary to the truth of the case. Here is the less reason too for saying that a new highway has been set out in lieu of the old one, because Egg-lane has not been widened through its whole course but the additions are only made in patches; so that if the old course of the highway were stopped up, there would be no continuity of road in any other place in lieu of the other old highway which has been stopped up. However when magistrates have jurisdiction on certain conditions only, their order though confirmed on appeal may be disputed in a collateral proceeding on the ground of non-compliance with these conditions.

4. WILSON V. WELLER. E. T. 1819. C. P. 1 B. & B. 57.

Per Richardson, J. Where a magistrate has competent jurisdiction, and But, in general it is conclusive. adjudges, and on refusal to pay issues a warrant of distress and sale, the goods taken under it are not repleivable.

5. REX V. PRICE. H. T. 1795. K. B. 6 T. R. 143.

An order in bastardy was made on the defendant on the 3rd of July, 1753, to the following effect; viz. "The order of us, Langton and Dashwood, two justices, &c. residing near to the Parish of Harrington, concerning a male bastard child of E. G., born in the said parish of H. First, upon due examination and proof, we do adjudge John Fox is the putative father, who had notice of the time and place of examination, &c.; we therefore do order, &c., as well for the relief of the said parish of H. as for the maintainance of the said child, that the said J. F. do pay to the said churchwardens and overseers of H. the sum of 50s. for the midwife and other charges, and for the maintainance of the child from the birth to the day of making this order, being about 21 weeks; and after the day of making this order, we order &c. that he pay &c. 2s. a week so long as the said child shall continue chargeable, &c., and that he give security to the said parish to perform the said order." This order being brought up by *certiorari*, four exceptions were taken to it: 1st. That it is not adjudged that this child was born in the parish of H., but only so said in the title of the order. 2dly. That the sum of 50s. so ordered to be paid for the midwife, charge &c., and it is not adjudged that so much had been actually expended by the parish. 3dly. The order is not said to be made on complaint of the churchwardens, &c. 4thly. the justices have ordered the defendant to find security to indemnify the parish before there is any breach of the order, when on his refusal, they ought only to have taken his recognizance to appear at the sessions. *Per Cur.* In answer to the exceptions; 1st. It must appear where the child was born, because the jurisdiction is given to the two justices living next to the parish church where born &c.; but this need not be a part of the adjudication, but if it appear in any part of the order it is sufficient; and we think it does in this case and not in the title only; for it begins "the order of us L. and D., &c.;" and that it need not be in the adjudication was held in *Rex v. Redslaw*, H. 22. c. 2., *Rex v. Rook*, M. 26 G. 2.; and the case in *Lord Raym.* 1562. of *Rex v. Godfrey*, if diligently attended to, does not contradict this. There it was "on complaint that the child was born in the parish &c." So there it was not part of the order, nor the words of the justices, as here we think it is; and the law is now clearly settled, that if it appear in any part of the order, and in the words of the justice, it is sufficient. The second exception is waived, and has been many times determined. 3dly. The justices have

ing power to indemnify the parish, may do it in this manner, by a sum in gross for the charges of lying-in and other incidental charges, as was held in the case of *Rex v. Moravia*. 4thly. as to the fourth objection, we shall take time to read the act of 6 Geo. 2. to see if that gave the justices any new power, because it has been often determined on 18 Eliz. they had no power to take security, and upon that statute this part of the order will certainly dwell; but if that should be the case, it would be only void *pro tanto*, and stand as to parts that are good, as was resolved in 8 & 9 Geo. 2. *Rex v. Messenger*.

6. *REX v. SWEET*. M. T. 1807 K. B. 9 East, 25.

When an order is defective only in one point, so that the remainder may exist as a good order by itself; the Court will quash it as to the defective part and enforce it as to the rest.

It was objected to an order of bastardy; 1st. That there was no sufficient adjudication of the birth of the bastard child in the parish of Newington, but only a recital of that fact. 2ndly. That the sessions had no jurisdiction to award the payment of costs. Grose, J. I feel a difficulty in saying that the justices may not direct the defendant to pay the costs of the parish obtaining the order. It is true the expenses may be improperly imputed by going in the first instance to the quarter sessions, instead of applying to the two neighbouring justices, where that may be done; but of that the justices will judge in considering the *quantum* of costs. But as the sessions have an original jurisdiction in this matter, and the words of the statute of Elizabeth being, that the justices shall take order "for the better relief of every such parish in part or in all," and this being a remedial law, it did appear to me that the justices had a power of directing the fair and necessary expences of the parish in obtaining the relief granted to be paid by them; otherwise, so far from taking order for their better relief in part or in all, the parish may, in some cases, be more burthened by the expense of obtaining the order than by the maintenance of the child. However, as my lord and my brothers have no doubt upon the subject, it must be presumed that they have put the right construction on the statute. So much, therefore, of the order as directs the payment of costs must be quashed, but it must be confirmed for the rest, the order itself having separated the sums to be paid.

7. *REX v. ARCHER*. H. T. 1788. K. B. 2 T. R. 273.

The disobedience of an order of justices is a crime indictable.

Per Cur. The disobedience of an order of justices is so far criminal, that in almost every instance, the party disobeying may be indicted for it; this shows it to be a crime.

8. *REX v. NORFOLK, JUSTICES OF*. H. T. 1822. K. B. 1 D. & R. 69; S. C. 5 B. & A. 485.

Justices may supersede their own orders when im providently made.

Per Cur. Justices may supersede their own orders when im providently made.

XI. INFORMATION BEFORE. See *ante* tits. Convictions and Gaultie; and *post*, tit. Penal Actions; Qui Tam Actions.

1. *COHEN v. MORGAN*. E. T. 1825. K. B. 6 D. & R. 8.

Informations before magistrates must be taken as nearly as possible in the language used by the party.

A person having lost a bill of exchange, which he supposes to have been stolen, goes before a magistrate, and relates the circumstance of the loss, and the magistrate grants his warrant to apprehend A. B. on a charge of having "feloniously stolen, taken, and carried away" the bill of exchange (language which the complainant did not use when he laid his information), and upon subsequent investigation of the case it turned out to be no felony. Held informations before magistrates must be taken as nearly as possible in the language used by the party.

2. *REX v. NORTH*. E. T. 1825. K. B. 6 D. & R. 143. S. P. *REX v. JONES*. E. T. 1801. K. B. 8 T. R. 536.

And not in the vernacular.

Information on 48 Geo. 3. c. 143. for selling beer or ale, "without Excise license, without showing that the defendant had sold ale only.

Bayley, J. It does not appear to me that this is a mere formal objection; I think it is matter of substance. The information must contain a specific charge without ambiguity, in order that the defendant may know what he has to answer; see 2 Stra. 900; *Rex v. Middlehurst*, 1 Burr. 399; 1 Salk. 372; 2 Hawk. P. C. c. 25. s. 59. Here the substantial charge, as stated in the in-

formation, is that the defendant committed either one offence or another; i. e. that he has sold beer or ale without a license. The evidence upon which the magistrates convict, applies to selling ale alone. Now I know of no case in which it has been held, that if the charge in the information is informally made for being in the alternative, it can be made good by the evidence. There are many cases in which the Court has quashed a conviction, because the information has been uncertain, although the evidence has been sufficiently explicit. This defendant is called upon to answer an alternative charge, which cannot, I think, be made certain evidence. This is not in my opinion, such a defect in form as is contemplated by the third section of the statute. Convictions upon an act of parliament so penal require a great deal of certainty; and I think there is in this case the greater reason for yielding to this objection, that the statute prescribes a settled form of conviction, which has not been adopted.

XV PROCEEDINGS AGAINST.*

[764]

(A) BY ACTION.

(a) *Notice of.* See *ante*, tit. Action, Notice of: and 2 D. & R. 43; 1 B. & C. 124; 1 D. & R. 233; 1 C. & P. 459.

(b) *When a justice is liable to, and form of.*

1. BASSETT v. GODSCHALL. T. T. 1770. C. P. 3 Wils. 121.

Action against the justices of the peace, for refusing the plaintiff a licence to keep an inn or an alehouse. Wilmot, C. J. The legislature has intrusted the justices of the peace with a discretionary power to grant or refuse licenses for keeping inns and alehouses: if they abuse that power, or misbehave themselves in the execution of their office or authority, they are answerable criminally by way of information in King's Bench. I cannot think a justice of peace is answerable in an action to every individual who asks him for a licence to keep an inn or an alehouse, and he refuses to grant one; if he were so, there would be an end of the commission of the peace, for no man would act therein. Indeed, he is answerable to the public if he misbehaves himself, and wilfully, knowingly, and maliciously injures or oppresses the King's subjects under the colour of his office and contrary to law; but he cannot be answerable to every individual touching the matter in question in an action. Every plaintiff in an action must have an antecedent right to bring it; the plaintiff here has no right to have a license, unless the justices think proper to grant it; therefore he can have no right of action against the justices for refusing it.

An action will not lie against justices of the peace for refusing to license an alehouse.

2. LOWTHER v. RADNOR. M. T. 1806. K. B. 8 East, 113.

The statute 20 Geo. 2. c. 19. giving the magistrate jurisdiction to determine differences between masters and servants in husbandry, artificers, handicraftsmen, miners, potters, &c. "and other labourers," employed for any certain time, "or in any other manner," respecting wages within certain sums, extends to labourers of all descriptions, and not merely in the particular trades or businesses there enumerated, and consequently includes wages earned by a labourer who contracted to dig and stone a well for cattle to be paid for by the foot, and who employed another to assist him in the work. The party appealed to the sessions afterwards, and the Court held that it did not lie. Trespass brought against magistrates acting upon a complaint made to them on oath, by the terms of which they have jurisdiction, though the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time the party complained against having notice of such complaint and being properly summoned to attend.

Trespass does not lie against a justice acting upon a complaint made to him on oath, though the real facts of the case might not have supported such a complaint.

* By the 43 Geo. 3. c. 141. it is enacted, that in all actions against any justice of the peace for any conviction, &c. which may have been quashed, or for any matter done by him for carrying it into effect, the plaintiff shall not recover more than the sum levied under the conviction: and two-pence damages, unless it be expressly alleged in the declaration, (which shall be in an action on the case only,) that such acts were done maliciously, and without any reasonable cause. Case is the proper remedy for refusing bail, or to receive an information upon the stat. of hue and cry; 2 Saund. 61. d.; 3 B. & P. 551; 1 Leon. 312.

3. MORGAN V. HUGHES. H. T. 1788. K. B. 2 T. R. 225.

When a justice maliciously grants a warrant against another, without any information upon a supposed charge of felony, the remedy against the justice is trespass and not case.

Action on the case against a justice of the peace for maliciously granting a warrant against another, without any information, upon a supposed charge of felony. Ashurst, J. I have no difficulty in saying that the case as cited from Cro. Eliz., cannot be law; if it were, it would confound all legal principles which have governed cases of this kind. The general distinction is this: where the immediate act of imprisonment proceeds from the defendant, the action must be trespass, and trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other. But here the act of imprisonment was by the defendant alone; for it cannot be said to be the false imprisonment of the constable, who was bound to execute the warrant of a justice having competent jurisdiction; and, therefore, if it were not an imprisonment by the defendant, it was not an imprisonment by any person. But where a person is committed to prison by the warrant of a justice without any accusation, some person is guilty of false imprisonment; and it must be the imprisonment of the justice, who is the immediate and not the remote cause of it. The case in Cro. Eliz. certainly cannot be law; it does not appear ever to have been acted under, certainly not in modern times, within my experience.

4. BELL V. OAKLEY M. T. 1814. K. B. 2 M. & S. 259.

Where an officer professing to act under a magistrate's warrant, is in point of fact, and not in law, by subsequent a base, a trespasser *ab initio*, that is, sets out with an unjustifiable act, himself only, and not the magistrate likewise, is liable to the party grieved.

Defendants, in order to levy a poor's rate under a warrant of distress granted by two magistrates, broke and entered the plaintiff's house and broke the windows, &c. A verdict was found for them damages seven guineas, with leave for the defendants to move to enter a nonsuit, on the ground of there not being any proof of a demand of the copy of the warrant, as required by stat. 24 Geo. 3. c. 41. s. 6. A rule nisi to that effect was accordingly obtained in the last term. Lord Ellenborough, C. J. The case of Money v. Leach decides that the defendant, in order to avail himself of the objection upon the statute, must show that he acted in obedience to the warrant; in that case the officers apprehended a different person from the one described in the warrant, and, therefore, not in obedience to the warrant; and Mr. Yorke, the then Attorney-General, who was to have argued on behalf of the officers, gave up the point upon the second argument, as being too great a difficulty for him to encounter. Here the defendants, so far from showing that they acted in obedience to the warrant, commenced by an unauthorised course of proceeding; it was a trespass in them *ab initio*; and I do not see how, after the case of Money v. Leach, they can stir this objection. That was a case of much public interest, and was decided upon great deliberation, and the matter was upon the record. If it had not been a distinct subsequent trespass of the defendants, it might have presented a different question.

(c) *Within what time to be brought.*

1. MASSEY V. JOHNSON. E. T. 1810. K. B. 12 East, 67.

Under the 24 Geo. 2. c. 44. s. 1. a justice is answerable for such part of an imprisonment under his warrant as was with him in six calendar months of the commencement

This was an action of trespass and false imprisonment, which was brought against a magistrate of the county of Chester, in consequence of a commitment by him of the plaintiff to the House of Correction, under a proceeding which was contended by the magistrate to be a conviction of the plaintiff as a vagrant. The stat 43 Geo. 3: c. 141. does in no instance extend to protect justices of the peace in the execution of their office against actions for acts of trespass or imprisonment, unless done on account of some conviction made by them of the plaintiffs in such actions by virtue of any statute, &c. But whether certain proceedings alleged by the plaintiff to have been set on foot against him by the defendant, one of the justices of the peace, *ex mero motu*, without any information laid on oath before him (though falsely alleged to be on the information on oath of J. S.) on which the plaintiff was taken and imprisoned, was a conviction within the meaning of the act; so that the plaintiff was there-

By 24 Geo. 2. c. 44. s. 1. actions against justices of the peace, for any thing done by them in the execution of the office, or against constables, &c. or other persons acting by their order or in aid, must be commenced within six calendar months after the cause of action has occurred.

by confined to seek redress by an action on the case, framed as the act directs, the Court would not inquire of on affidavit, but sent the case to a new trial to have the facts of such conviction ascertained. And it appearing on a second trial that an information on the oath of T. A. on a charge of vagrancy against the plaintiff was laid before the magistrate on a certain day, when the plaintiff was examined and heard upon that charge, and that the magistrate then made out a warrant of commitment until the next sessions, in which warrant it was wrongfully stated that the plaintiff had been charged on the oath of T. S., who negatived having made such oath, but which allegation was held, having been rejected as surplusage, and afterwards drew up a conviction dated on the same day, but not exhibited until a month afterwards at the sessions; held that this was a sufficient evidence of a conviction, connected with the imprisonment, however informally such conviction of warrant of commitment operating as a conviction drawn up; and that the magistrate is liable to answer in an action for such part of an imprisonment suffered under his warrant, as was within six calendar months before the action commenced against him.

2. WESTON V. FOURNIER. M. T. 1811. K. B. 14 East, 491.

The arrest of the plaintiff under the warrant of the defendants was on the 21st of November, 1808, and he continued in custody up to July following, when he was discharged. The writ of *habeas corpus* was sued out on the 20th of May, 1809; and the next process proved was an *alias* writ, sued out on the 6th of February, 1810; and the memorandum of the record of Nisi Prius was of Hilary term, 1810. The notice of action to the magistrates was given on the 10th of March, 1809. It was objected at the trial, that as the first writ in May, 1809, was not returned, and there was no proof of the service of that writ, the *alias* writ in February, 1810, which appeared to be after the memorandum of the Nisi Prius record, could not be connected with it in continuance, and, therefore, that the action, which must be by the statute, see 24 Geo. 2. c. 44. be commenced and prosecuted within six months after the cause and notice of action, was out of time; and his lordship being of that opinion nonsuited the plaintiff.

If the writ upon which the plaintiff declares have not been sued out within six months, proof must be given at the trial that it was regularly continued from a writ sued out within that time.

3. JACKSON'S CASE. E. T. 1772. K. B. Lofft, 249.

Action of trespass against overseers for taking the plaintiff's gelding. They alleged that by virtue of their office, and in pursuance of a judge's order, they levied satisfaction for a poor's-rate, which was the trespass complained of. It was objected on the trial, that by the statute of 24 Geo. 2. demand should have been made of the persual of the justice's warrant, and six days' neglect or refusal, the judge being of the same opinion, plaintiff was nonsuited.

All persons acting under a justice's warrant are within the protection of the statute 24 Geo. 2.

Lord Mansfield. They are certainly within the act of the 24 Ed. 2.; and if the doubt had been on the other point, he would have called for the justice's warrant. The warrant is the authority under which the overseers act. To extend the benefit of the statute of James, was the intent of the statute 24 Geo. 2, and that all officers acting under a justice's warrant were included by it.—If they had distrained out of the parish it would have been no protection. See ante, tit. Constable; post, tit. Overseer.

(d) Declaration.*

(e) Tending amends, and paying money into court.†

1. DEVAYNES V. BOYS. T. T. 1816. C. P. 2 Marsh, 356; S. C. 7 Taunt. 33.

S. P. NESTOR V. NEWCOM. T. T. 1824. K. B. 4 D. & K. 776; S. C. 3 B. & C. 159.

This action was brought against the defendant in the character of a magis-

In an action against a justice he

* The venue must be laid in the county in which the facts complained of were committed, in all actions against justices of the peace, or other persons acting in their aid or command; 21 Jac. 1. c. 12. s. 5. In other respects, the declaration is the same as in ordinary cases.

† Justices of the peace, by the 24 Geo. 2. c. 44. s. 2., may tender amends to the party grieved before action brought, and may plead such tender, together with the general issue or other plea, with leave of the Court; or if he have neglected to make a tender, or the tender be insufficient, he may pay money into court; as in other cases, where the demand arises from pecuniary transactions.

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issue joined
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Court to
withdraw
the general
issue, pay
money into
court, and
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the money
can be paid
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lars.

trate, for false imprisonment; the declaration was delivered in Hilary term, and the general issue pleaded of the same term; and in Eastern term, the plaintiff delivered the issue with notice of trial for the next assizes. The defendant then moved for leave to withdraw the general issue, and pay money into Court.

Gibbs, C. J. The plaintiff's ground for resisting the application is, that payment of money into Court in a common case, is not by statute, but by the practice of the Court; that in this case, no tender could be pleaded at common law, and, therefore, that the Court, following the principles of the common law, cannot authorize such payment. It is true the legislature has said that the magistrate may pay a sum into court before issue joined; but that as the defendant has suffered issue to be joined, he has lost his opportunity. The motion, at all events, should be to place the parties in the same situation as if issue had not been joined; and the only difficulty is as to the form. I am told by the officers of the court, that if the general issue be pleaded as of Hilary term, and issue be joined, which issue is afterwards severed, and the general issue be pleaded again, it would still be of Hilary term; and then we should be directing the money to be paid in after issue joined, which we certainly could not do, at least after issue has been effectually joined. But we apprehend we should not be exceeding the power given us by this act if we were to rescind the issue which has been joined, and send the parties back to an earlier stage of the proceedings, in order to do that which has been omitted. If the effect of the rule would be to let the former issue stand, we could not grant it; but I understand, that if the plea be withdrawn, the issue may be joined again, after the rule is drawn up.

2. *CASBOURN V. BALL.* H. T. 1772. K. B. 2 W. Bl. 859.

Action of trespass, assault, and false imprisonment, against a justice of the peace. It was moved that he might be permitted to pay twelve guineas into court, pursuant to the statute 24 Geo. 2. he having omitted to tender amends. But, it not appearing that the action was brought against him as a justice, for acts done in the execution of his office; the Court only granted him a week's time to plead; before the expiration of which time the plaintiff's notice of action being produced, and proved by affidavit, and it appearing to be brought for a supposed misconduct in his office, the Court granted the common rule for payment of the said sum into court.

(f) *Pleas.**

GRAY V. COOKSON. T. T. 1812. K. B. 16 East, 13.

Per Cur. If a conviction be good upon the face of it, the production and proof of it at the trial will justify the convicting magistrate under the general issue in an action of trespass as well in respect of such facts therein stated as are necessary to give them jurisdiction, as upon the merits of the conviction.

(g) *Evidence.*

1. *STRINGER V. MARTYN.* M. T. 1810. N. P. 6 Esp. 134.

Trespass against a justice of peace for entering a bond, and taking goods under his warrant, and tenders amends. Upon the notice being read, it was objected that upon this notice there must be a verdict for the defendant. The tender being of 2*l.*, and the replication having admitted the value of the pewter-dishes to be 2*l.* though laid under, viz. the plaintiff could not go beyond 2*l.* though the jury could give less; the sum tendered, therefore, covered the trespass, and was, by the plaintiff's own showing, sufficient amends.

The Lord Chief Baron, after referring to the notice, was of opinion that the trespass complained of applied to the goods only, the part respecting the house being the place only where they were taken, and not a distinct trespass; and, that the plaintiff having admitted the tender, and by the notice having limited the value of the goods lost to 2*l.* could claim no more, and that it was covered by the tender. The plaintiff was non-suited.

* By 1 Jac. I. c. 15. s. 16., justices of the peace, &c., or any other acting in their aid and assistance, or by their command, may to any action plead the general issue, and give the special matter in evidence.

3. BURLEY v. BETHUNE, E. T. 1818. C. P. 1 Marsh. 220; S. C. 5 Taunt. 580.

In an action against the magistrate for a malicious conviction, it appeared that the plaintiff being a rogue and vagabond, in leaving his wife and family, whereby they became chargeable to the parish, in consequence of which the plaintiff was imprisoned for the space of seven months, until he was carried by writ of *habeas corpus* to the Court of King's Bench, and by that Court released and discharged. They might have been sufficient ground for the conviction, though it rested on false testimony. The Chief Baron being of the same opinion, and considering the 43 Geo. 3. placed these actions on the same footing as those for malicious prosecutions, directed the plaintiff to be non-suited, on the authority of *Perrell v. Macnamara*, 9 East, 369. A rule nisi had been obtained on a former day in this term, that the nonsuit should be set aside and a new trial granted; and counsel were to have shown cause against the rule, but were stopped by the Court, who called on the other side.

Gibbs, C. J. The principles on which these actions were founded are not disputed. It is admitted that there must be proof of the want of probable cause, but the question is in respect of what must in the absence of probable cause be proved? There is a wide distinction between actions for malicious prosecutions and actions for malicious convictions. In the former if the plaintiff show that there was no ground for the accusation, malice is to be inferred from that circumstance, because the prosecutor must have sworn to the truth of the charge. But in actions for malicious convictions, the question of probable cause does not depend on the actual guilt or innocence of the plaintiff but on the evidence which is given before the magistrate. The plaintiff contends that it was incumbent on the defendant to produce that evidence, and that he, the plaintiff, had no means of getting at it. Depositions are given *vis-à-vis*, and the plaintiff might either have called somebody who was present, or else he should have given the magistrate notice to produce the depositions. — But certainly, as the plaintiff could not make out his case without proving want of probable cause, and as that depended on what passed before the magistrate the plaintiff having given no evidence of this is not entitled to recover.

(h) Damages.* (i) Costs.†

ROGERS v. JONES. M. T. 1824. K. B. 5 D. & R. 269. S. P. GRAY v. COOKSON. T. T. 1802. K. B. 16 East, 13.

Per Cur. If a conviction be good upon the face of the document, producing it and proving it at the trial, will justify the convicting magistrates, under the general issue in an action of trespass, as well in respect of such facts as are necessary to give them jurisdiction, as upon the merits of the conviction.

* In an action against justices of the peace, on account of any conviction made by them or for any thing done by them, or by them commanded to be done, for the levying of any penalty, apprehending of any party, or in the carrying of any such conviction into effect, the plaintiff shall not recover more than 2*d.* damages (over and above the amount of any penalty levied upon him, if any levy have been made), nor any costs of suit whatever, unless it be expressly alleged in the declaration that such acts were done by the defendant without any reasonable and probable cause; nor shall the plaintiff be entitled to recover the amount of any penalty levied, or any damages or costs whatsoever, if it be proved at the trial that he was guilty of the offence for which he was convicted, &c., and that he had undergone no greater punishment than is assigned by law for such offence; 43 G. 3. c. 14*r*; see vol. vi. tit. Costs.

† In action against justices the plaintiff is not entitled to costs, unless it be stated in the declaration that the acts complained of were done maliciously, and without a reasonable or probable cause; nor is he entitled to costs, if it be proved at the trial that he was guilty of the offence of which he was convicted, &c., and that he had undergone no greater punishment than was assigned by law for such offences; 43 G. 3. c. 3. s. 141. — But if in such an action the judge certify that the injury was wilfully and maliciously committed, it seems the plaintiff is entitled to double costs; 24 Geo. 2. c. 44. s. 7. The defendant, if he have a verdict, or if the plaintiff be nonsuited or discontinue the action, is entitled to double costs in actions against justices; 7 Jac. 1. c. 5. s. 3; M. & S. 131. In order to entitle a magistrate to double costs under this statute, if it do not appear upon the face of the record that the action was brought against him as a justice, for something done by him in the execution of his duty, he must obtain a certificate to that effect from the judge at or after trial; 17 T. R. 448; 1 Doug. 807; 2 Stra. 974; 3 East, 92.

The 43 Geo. 3. c. 141. s. 2. only applies to cases where the conviction has been quashed.

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An information lies against a justice for wilfully absenting himself so as to prevent the holding of a session; Or for acting partially;

(B) CRIMINAL INFORMATIONS.*

1. DOMINUS v. FOX. H. T. 1716. K. B. 1 Stra. 2.

The defendant being Mayor of Totness for the preceeding year, was, by the terms of the charter, a justice of the peace for the following year, without whom the sessions could not be held. The Court granted an information against him for a voluntary absence.

2. DOMINUS v. NEWTON. H. T. 1720. K. B. 1 Stra. 413.

By the statute 1 Geo. 2. c. 13. s. 11. it is enacted, that any two justices of the peace may summon any person to take the oath before them; and if they do not appear, then on oath of serving such summons, the justices are to certify the same to the quarter sessions, where, if the party so summoned do not appear to take the oaths, he shall stand convicted of recusancy. The defendants were justices of the peace, and issued their summons accordingly; but coming afterwards to understand that the party was a gentleman of fashion, and not suspected to be against the government, lest a transaction of this nature should be an imputation upon him, they refused to give the prosecutor his oath of the service of such summons, that the matter might go no further. And now upon motion against them for an information, the Court declared that the justices had no discretionary power to refuse to put the act in execution, and therefore granted the application.

3. DOMINUS v. JAMES. E. T. 1745. K. B. 2 Stra. 1256.

Or acting without jurisdiction; Indictment at Cumberland sessions for fastening nets across the river Eden contrary to the stat. of 2 Hen. 6. c. 15. There were exceptions taken to it; but the objection for which it was quashed was, that the statute gives the penalty of 100s., but gives no jurisdiction to the sessions, and they cannot have it without express words in the case of a new created offence.

4. DOMINUS v. CLARK. M. T. 1744. K. B. 2 Stra. 1216,

Or for an excess of power in bailing a prisoner; H. L., as justice of Surrey committed a man on suspicion of stealing a mare, and bound over the owner to prosecute. Afterwards upon examining two other persons, he admitted the party to bail. The prosecutor appeared at the assizes, and found a bill, but the party accused did not appear; and the Court granted an information against the justice, declaring they should not have bailed the man themselves.

[772]

Or for corruption in licensing;

5. REX v. FORSTER. E. T. 1787. K. B. 1 T. R. 692.

An information had been moved for against the defendants, who were justices of the peace for the county of Middlesex, for improperly granting an ale license to one Harrison, who had been refused one by the justices at their last general meeting on account of misbehaviour. It appeared that the defendant Forster had been present at the general meeting at the time when the license was refused; but he had afterwards told the other defendant, Holland, who was not present at the general meeting, that the only reason why a license had not been granted then was, that they might have an opportunity of inquiring into the character of Harrison, and had accordingly prevailed upon Holland, at a private meeting held by those two only, to join in granting a license. The Court were clearly of opinion, that an information should be granted against a justice, as well for granting a license improperly, as for refusing one in the same manner. That it had already been done in the case of the King against Filwood and another; 26 Geo. 3. B. R. That the only ground of these applications was the improper conduct of the magistrates. But as it appeared in this case that Holland, though not altogether blameless, had been deceived by Forster, they discharged the rule as to the former, upon his paying the costs of the application, as against himself; and as to Forster, they granted the information.

6. REX v. JONES. H. T. 1742. C. P. 1 Wils. 7.

Or for ill-gally doing mandating a Rule to show cause why an information should not go against defendant, a justice of the peace *pro con. Midd.*, for demanding one shilling of J. S., who

* Informations against magistrates are subject to nearly the same rules as those against private individuals; and we shall only, therefore, notice those circumstances in which they differ.

was brought before him, which defendant insisted upon as his due, for what he called discharging his warrant; and upon refusal to pay it, he sent J. S. to the New Prison. Upon showing cause, this matter was denied, and so the rule was discharged, otherwise the Court would have granted an information. fee, and committing on refusal to pay;*

7. THE CASE OF THE SURGEONS' COMPANY. T. T. 1798. K. B. 1 Salk. 374.

A *mandamus* was granted to the Company of Surgeons to choose officers; they made a return under their common seal. And now a rule was moved for and granted, to file an information against some particular persons of that company for that return; and the Chief Justice said, the Court must proceed by way of information; for being a matter concerning public government, no particular person is so concerned in interest as to maintain an action, and the information must be granted against particular persons, though the return be under the common seal, for there is no other way to try the right; and if it be found for the King, there must be a peremptory *mandamus*; perhaps we shall set but a small fine. Or for making a false return;

8. REX v. FIELDING. H. T. 1759. K. B. 2 Burr. 719.

Upon showing cause against an information, which had been moved for by one Mr. Barnard against the defendant, for a misdemeanor committed by him in his office of a justice of the peace, relating to the committing and detaining charge by the Duke of Marlborough, "that this young man had sent him threatening letters, &c." The Court were unanimous in opinion, that the main and principal charge, was the ground and foundation of the rest, and, indeed, the key to the whole nature and complexion of Mr. Fielding's behaviour, appeared to be false in fact, and quite misrepresented to the Court by Barnard the father, and Barnard the son; and that the justice of peace appeared to have acted in this affair without any bad or oppressive or injurious intention, though in some respects irregularly; and, therefore, although the present complaint appeared so ill-grounded, that the complainants deserved to be punished in costs for making it; yet as the justices had made the commitment without previously taking the Duke of Marlborough's oath, and also neglected to take his grace's recognizance to prosecute, both which parts of his conduct were irregular, he had no right to receive costs. [773] But if the justice's conduct appears not to have been malicious, the Court will not interfere in this summary way.

9. REX v. SEAFORD. T. T. 1732. K. B. 1 Blac. 432.

Motion for an information against four persons who were churchwardens and overseers of Seaford, and also the only justices of the peace for the said borough, refusing to put a substantial householder upon the poor's rate (which is a necessary requisite towards giving a vote for members of parliament), and upon appeal refusing to amend the rate, or give relief to sessions. But, as they were acting in a court of record, with powers entrusted to them by the constitution, the Court said it must be a very strong case indeed, with flagrant proofs of their having acted from corrupt motives that would warrant a rule for an information, and therefore refused to grant a rule to show cause. In short, to induce them to do so, the conduct must be very flagrant;

10. REX v. WEBSTER T. T. 1789. K. B. 3 T. R. 388.

A rule had been obtained calling upon the defendant, who was a justice of the peace for the county of Devon, to show cause why an information should not be exhibited against him for having improperly convicted a person for killing a hare, the conviction having been afterwards quashed at the quarter sessions. The party applying for the information charged the defendant with very gross misconduct. But, Lord Kenyon, C. J. The question is not originally whether the doors of justice shall be stopped, but whether justice shall be approached by this particular avenue. If the defendant has acted improperly, however guilty the party applying might be of the charge which was imputed to him, there are other ways open to him for redress; but we cannot interfere in this particular manner, according to the established rules of the court, without an affidavit of the party complaining that he was innocent of the fact with which he was charged. I remember an application of this sort made many And the party must swear that he is not guilty of the charge made against him;

* Or against a magistrate or collector of taxes for extortion, see 1 Eers. Ca. 159, 160; or for abusing the commission to the oppression of the subject, see Hawk. b. 2; Co. 26. s. 1; or for making a false return to a *mandamus*.

[774] years ago against Sir John Fielding, for having issued his warrant against one Barnard, on a charge against him (not upon oath) by the Duke of Marlborough, for sending threatening letters to extort money from the duke. But the information was denied for the want of such exculpatory affidavit from Barnard; see *Rex v. Fielding*, *ante*, 773.

11. *REX v. SMITH*. M. T. 1796. K. B. 7 T. R. 80.

And the application should be made early; Motion for a criminal information against the defendant, for a neglect of duty as a magistrate of Surrey. Lord Kenyon, C. J., expressed a doubt whether it was not contrary to the practice of the Court to grant an information against a magistrate so late in the term, that he could not show cause against it during the term, and whether the application should not be deferred untill next term; But the officers of the Court certified that such a motion as the present might be made at the end of the term for supposed misconduct during the term; and that the practice alluded to only applied to cases where the fact complained of happened before the commencement of the term.

12. *REX v. HARRIES*. H. T. 1811. K. B. 13 East, 270.

For it will not be allowed after two terms; Motion for leave to file an information against two justices of the peace for the County of Salop, upon a charge of having improperly refused an ale licence. But after stating the refusal was in September (this being H. T.), the Court doubted whether this application were made in time, this being the second term after the fact complained of. Some gentlemen of the bar, however, as *amici curiæ*, suggested that the same point had been made the consideration of the Court a few years ago; when it was settled that an information might be moved for in the second term after the offence committed. there being no intervening assizes.

13. *REX v. GRANTHAM*. H. T. 1811. K. B. 13 East, 322.

The Court will not grant a rule *nisi* for a criminal information against a magistrate so late in the second term after the imputed offence as to preclude him from the opportunity of showing cause against it in the same term.

14. *JONES v. MARCH*. M. T. 1791. K. B. 4. T. R. 465.

It is also essential that notice of motion should be given, and the ground of complaint therein stated.

15. *REX v. BAINE*. E. T. 1716. K. B. 2 Burr. 1162.

[775] Upon showing cause why an information should not be granted against two justices of the peace and others, for a misdemeanour relating to the conviction of a poacher, and the circumstances attending it, the Court thought proper, upon fully hearing and considering all the affidavits and what was urged by the counsel on both sides, to discharge the rule as to all the defendants, with costs to be paid to the justices, but without costs as to the others. And they were upon this occasion most explicit in their declaration, "that even where a justice of peace acts illegally (which, however, was not the present case), yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill intention whatsoever, the Court will never punish him in this extraordinary course of an information, but leave the party complaining to the ordinary legal remedy or method of prosecution, by an action or indictment.

And this must be done in sufficient time before the motion, to enable the justice, if he thinks proper, in the first instance to oppose the motion for the rule *nisi*; but he seldom avails himself of this opportunity, as he can more effectually make his defence when the affidavit containing all the circumstances of the charge is filed, on showing cause why the rule should not be made absolute; see *Hand Prac.* 3. An affidavit of the service must then be made, in order to induce the court to grant the rule *nisi*, in case no opposition is made on the part of the defendant; see *Hand. Prac.* 3.

And, in general, whenever the charge is altogether groundless, costs will be directed to be paid to the magistrate and that not only by the prosecutor himself, but by his attorney who joined in the affidavit for the rule, if his motives be proved to be malicious; see 2 Burr. 654. But where the justice, though cleared from all oppressive intentions, appears to have acted irregularly, the court, while they will discharge the rule, will leave him to pay his costs, as if he were a common defendant; see 2 Parr. 722. From this stage of the proceedings the course seems to be the same, whether the object of the prosecution be a magistrate or a private individual. It need only, therefore, be observed, that the Court incline, throughout the prosecution, to protect those whose authority it is important to

King's Bench, Court of.***King's Bench Prison.** See *post tit. Prisoner.***1. IN THE MATTER OF BRYANT. T. T. 1799. K. B. 4 T. R. 716.**

This rule called on Mr. Bryant to show cause why he should not be removed from his office of clerk of the papers within the King's Bench prison. The application was made on two grounds. 1st. That he has not personally resided within the walls or the rules of the prison since the month of March last. 2ndly. That the duties of the office had not been properly discharged by his deputy since that time. Lord Kenyon, C. J. I am very clearly of opinion that this officer must reside within the prison, even without the assistance of the act of parliament, which indeed requires the same thing. It is incident to every public office that the party should be in a situation to discharge the duties of it. I am also of opinion that he cannot act by deputy; but as this officer appears to have acted under a mistake, I think it would be too harsh a proceeding to remove him now for non-residence. But I desire it may be understood that he must immediately reside on the spot, so as to be capable of discharging the duty of his office.—Rule discharged.

The clerk of the papers within the K. B. prison must reside within the prison.*

2. IN THE MATTER OF BYRANT. H. T. 1794. K. B. 5 T. R. 509.

The application in the above cause was renewed, and the counsel called on to show cause in this case, why he should not be removed on affidavits, charging, that since the direction given to him by the court in Trinity term, 1792, he had not resided within the prison, nor had given any attendance there above ten times during that period; and that he had also entered into an agreement with one O'Harra, by which it was stipulated the latter should execute the offices for the defendant, reserving to himself an annual stipend out of the profits of the same, against the provisions of the ninth clause in 27 Geo. 2. c. 17. In answer to these charges, affidavits were read on the part of Mr. Bryant, stating that from the period when this matter was before the Court on former applications his circumstances were very much deranged, whereby he had been rendered incapable of complying immediately with the intimation of the Court then expressed to him; but those being now settled, he had begun already to move furniture into his house, within the prison, and was prepared to commence his fixed residence therein. With respect to the other charge, it was attempted to be explained, by showing that O'Harra was merely engaged,

And under 27 Geo. 2. c. 17. s. 8. the Court may remove the clerk of the day-rule in the K. B. prison for non-residence.

maintain, and who must be liable to error in the honest discharge of their numerous and complicated duties.

* This is the supreme court of the common law in the kingdom, consisting of a chief justice and three *puisne* justices, who are, by their offices, the great conservators of the peace and head coroners of the land. The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It controls all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires; in cases where there is no other specific remedy. It protects the liberty of the subject, by summary and speedy interposition. It takes cognizance of both criminal and civil causes; the former in what is called the crown side, the latter on the plea side, of the court. The King's Bench is likewise a court of appeal, into which may be removed, by writ of error, all the determinations of the Court of Common Pleas, and, generally of all inferior courts of record in England. Yet, even this high and extensive tribunal is not the dernier resort of the subject; for, if a suitor be not satisfied with any decision here, he may remove it by writ of error into the House of Lords, or the Court of Exchequer Chamber, according to the nature of the suit, and the manner in which it has been prosecuted.

† The office of marshal of the King's Bench prison was granted by King James the First, in the 14th year of his reign, to Sir William Smith, knight, in fee; and the appointment to that office, as well as of the inferior officers, continued in the proprietors of the inheritance of the prison, till the statute 27 Geo. 2. c. 17. by which the office was revested in the crown; and by that statute the marshal has the appointment of all inferior officers belonging to his office, such as the deputy marshal, chaplain, clerk of the papers of the King's Bench prison, and clerk of the day rules (which latter officers must be resident within the prison, or its rules), three turnkeys, and four tipstaffs (one for each of the judges) &c. And by a late rule, the marshal must also reside within the king's Bench prison, or the rules thereof, according to the terms of the above statute and of his patent,

[777] ged as agent in the execution of these offices. The Court were unanimously of opinion that the rule should be made absolute. That though the clause requiring the residence of the marshal, did not in terms extend to the other officers; yet considering the duties of those officers, in whom the public reposed a considerable confidence and trust, and who were each in their several stations, to contribute toward the good order and government of the prison, it was evident from other parts of the act that the legislature intended to require the personal residence of their officers, and particularly of those persons for whom a house was built in the prison at the public expense, and who execute the office in person. That though the Court would not remove any of the officers for any occasion of non-residence, they were bound to remove this person, who was ordered by them near two years ago to reside within the walls of the prison, and who has assured the Court that he would comply with that order; that the disobeying of that order was in itself such a neglect of duty, and such a misbehaviour in his office, as warranted them, under the eighth section, to remove him.

The term "commonalty" in the charter of the corporation of Kingston-upon-Hull includes the whole corporation.

King's Palace. See tit. *Arrest*.

Kingston-upon-Hull.

REX V. OSBOURNE. M. T., 1807. K. B. 4 East, 327.

The Court held, that the term "commonalty," in the charter of the corporation of Kingston-upon-Hull, includes the whole corporation.

King's Servant. See tit. *Arrest*.

Kidnapping.*

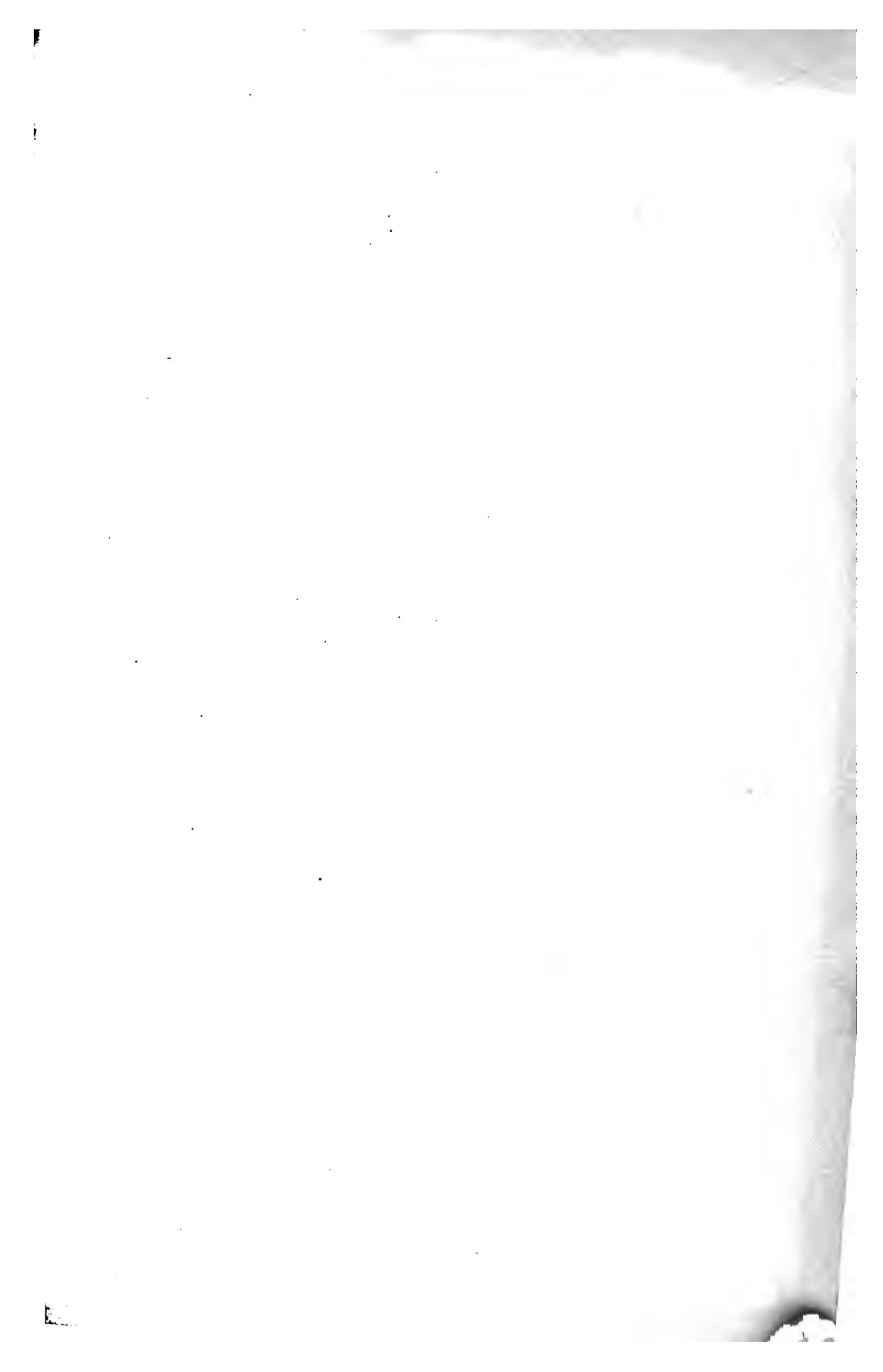
Labourers. See *post*, tits. *Master and Servant*; *Poor*.

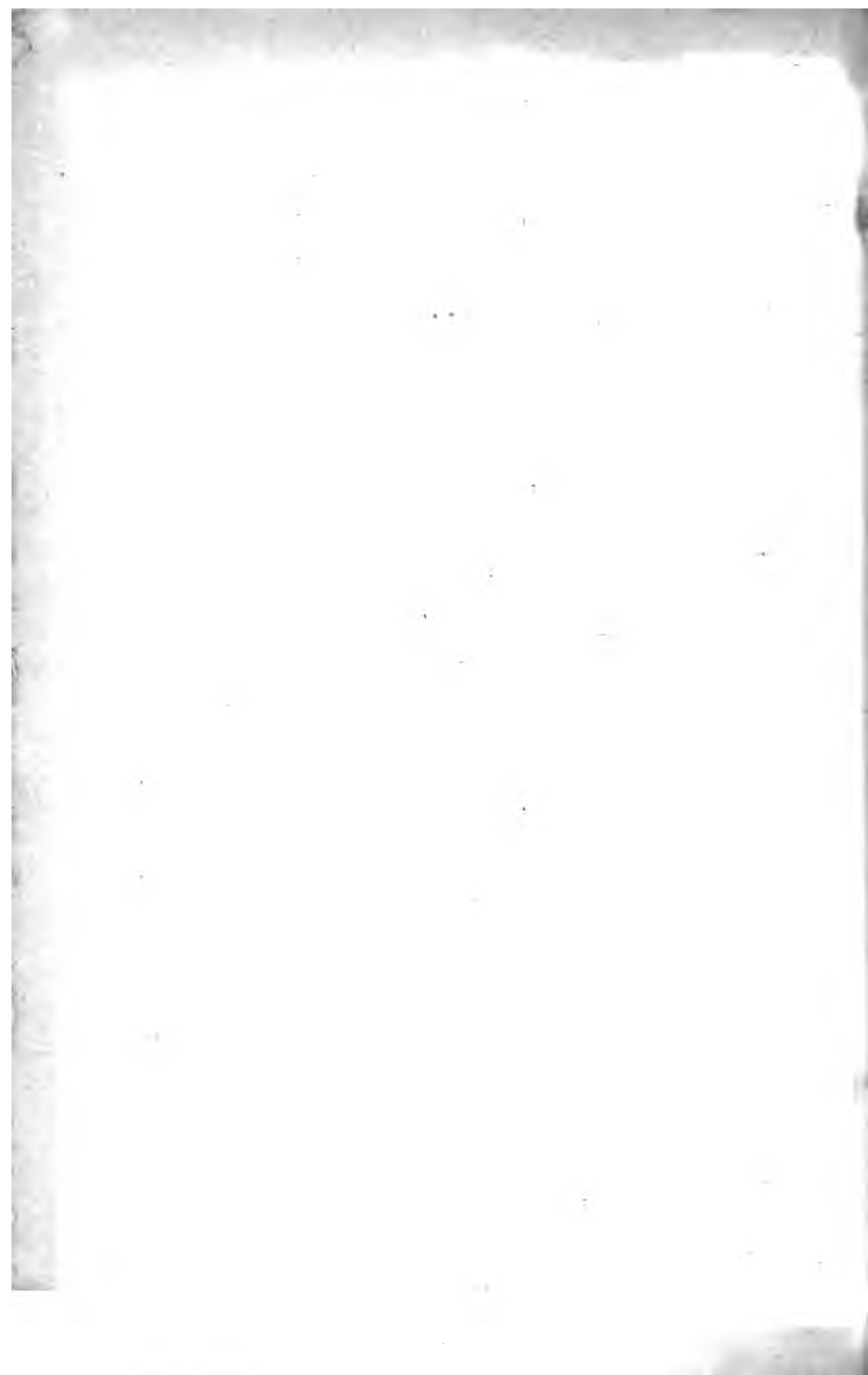
Laches. See *ante*, tits. *Bill of Exchange and Promissory Notes*; *post*, tit. *Practice*.

* This offence consists in carrying off a man, woman, or child, from their own country, and sending them into another. It is punishable with fine and imprisonment. By 11 & 12 W. 3. c. 7., masters of merchant vessels are punishable with three months' imprisonment who, being abroad, force any person on shore, or wilfully leave him behind, or refuse to bring home all such persons as they carried out, if able and desirous of returning. The 58 Geo. 3. c. 38. provides that offences against this statute may be prosecuted by indictment or information in the Court of King's Bench.









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